THE

MADRAS LAW JOURNAL.

II] JULY. [1946

NOTES OF RECENT CASES.

Chandrasekhara Aiyar, J. Thammayya *v.* Sathamma.
28th March, 1946. S. A. No. 2363 of 1945.

Registration Act (XVI of 1908), *section* 49—*Partition list inadmissible for want of registration—Oral evidence cannot be permitted to prove partition.*

Where a partition is evidenced by a deed or list which is inadmissible in evidence for want of registration, oral evidence cannot be permitted.

(1944) 2 M.L.J. 164 : I.L.R. 1945 Mad. 160 (F.B.), relied on.

(1946) 1 M.L.J. 295 : L.R. 73 I.A. 28 (P.C.), distinguished.

P. Somasundaram for Appellant.

P. Chandra Reddi for Respondent.

K.S.

Horwill and Shahab-ud-din, JJ. Mari Goundan *v.* Nachiappa Chettiar.
10th April, 1946. A.A.O. No. 357 of 1945.

Provincial Insolvency Act (V of 1920), *section* 4—*Scope of jurisdiction under—Sale of right, title and interest of insolvent—Application of buyer for removal of obstruction and delivery of possession—Jurisdiction to decide.*

Where the Official Receiver has sold the right, title and interest of the insolvent the purchaser seeking to obtain possession can apply for the removal of any obstruction and delivery of properties. It cannot be said that the Insolvency Court has no jurisdiction under section 4 of the Provincial Insolvency Act to enquire into this question. The Insolvency Court does not lose jurisdiction to enquire into a matter merely because it is not necessary for the administration of the estate that the question should be decided. Section 4 empowers the Court to decide all questions whether of title or priority or of any nature whatever which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice.

T. V. Ramanatha Aiyar and *T. S. Venkatarama Aiyar* for Appellant.

S. Panchapakesa Sastri, P. S. Ramachandran and *T. R. Srinivasa Aiyar* for Respondents.

K.S.

Horwill and Shahab-ud-din, JJ. The Official Receiver, Ramnad *v.* Lakshmanan Chettiar.
17th April, 1946. A.A.A.O. No. 5 of 1945.

Hindu Law—Custom—Nattukottai Chetty community—Stridhanam of bride invested with her husband—Nature of interest of her children in it—Husband if debtor or trustee.

In the Nattukottai Chetty community the children do not have a joint interest with the mother in the *stridhanam* fund given to her on marriage. The mother is solely entitled to the fund and where she lends the money to her husband it cannot be said that it constituted a trust fund for the benefit of her children which can be claimed, on the insolvency of her husband. The insolvent must be regarded as merely a debtor of the wife and not as a trustee for the children.

Case-law discussed.

K. Bashyam and *R. Viswanathan* for Appellant.

R. Gopalaswami Ayyangar and *P. Mrithyunjaya Aiyar* for Respondent.

K.S.

Horwill and Shahab-ud-din, JJ. 18*th April*, 1946.

Patan Alikhan, *In re.* R. T. No. 15 of 1946. (Cr. App. Nos. 158 and 123 of 1946) and Cr. R. C. No. 307 of 1946.

Criminal Procedure Code (*V of* 1898), *sections* 367 *and* 537—*Sessions case—Succeeding Judge—If can pronounce a judgment in case heard by his predecessor—Conviction—Legality.*

Section 537, Criminal Procedure Code, does not authorise a succeeding Sessions Judge to pronounce a judgment of his predecessor who has heard the Sessions case. The moment the predecessor hands over charge to his successor he becomes *functus officio* and has no jurisdiction to write a judgment and the successor has no jurisdiction to pronounce a judgment based on evidence recorded by his predecessor. The "presiding officer" referred to in section 367 (1), Criminal Procedure Code, means the presiding officer at the trial, who is assumed in the section to have written and pronounced his judgment while still holding the same office. A conviction by the succeeding Sessions Judge is illegal and must be set aside.

V. Rajagopalachari, K. S. Jayarama Aiyar (for *A. Bhujanga Rao* and *M. Sundaram*) and *S. A. Seshadri Ayyangar* for the Accused.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. 25*th April*, 1946.

Rathan Lal, *In re.* Crl. R. C. No. 1085 of 1945. (Crl.R.P. No. 1007 of 1945).

Hoarding and Profiteering Prevention Ordinance (*XXXV of* 1943)—"*Dealer*"—*Interpretation—Manager—If "dealer".*

The manager is only an employee of the proprietor and cannot be said to be the person carrying on business and is not liable to conviction as a "dealer" under the Ordinance.

V. Rajagopalachari for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. 26*th April*, 1946.

Abdul Sabbar *v.* Jamal Mohideen Sahib & Co. C.R.P. No. 1417 of 1945.

Practice—Court-fee—Fresh valuation after registration of suit—When proper.

Mere registration of the suit cannot be taken to be a decision that the court-fee paid was correct. It is open to the Court to have a fresh valuation made when there was no considered order on the question of the court-fee payable before registration of the suit. Decision in C.R.P. No. 1366 of 1945, followed.

K.A. Viswanathan for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*), *John and Row* and *V. Sriramamurthi* for Respondents.

K.S.

Chandrasekhara Aiyar and Kuppuswami Ayyar, JJ. 28*th May*, 1946.

Mariappan, *In re.* R. T. No. 51 of 1946.

Government of India Act (1935), *section* 205—*Granting or withholding certificates—Procedure—Duty of High Court.*

The High Court can grant a certificate under section 205 of the Government of India Act only in cases where a substantial question of law as to the interpretation of the Government of India Act or any Order in Council made thereunder is involved; in other cases a certificate cannot be issued. The section casts on the High Court the duty to consider in every case, of its own motion, whether any such question is involved and to give or to withhold a certificate accordingly. When the High Court says nothing about a certificate and do not grant it, it means that on the materials then before the Court, no such question as would warrant the grant of a certificate is involved. It is not necessary in each case to say in so many words that the High Court withholds a certificate. The High Court is under no obligation to say something in express terms as to what is its intention with regard to the power conferred under section 205 of the Government of India Act.

V. V. Radhakrishnan and *V. N. Jagannadha Rao* for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S

Yahya Ali, J. Raghava Mannadiar *v.* Thayyunni Mannadiar.
23rd April, 1946. C.R.P. No. 55 of 1946.

Civil Procedure Code (*V of* 1908), *section* 151—*Jurisdiction to amend a decree which has been confirmed or varied on appeal.*

The jurisdiction of a Court of first instance to amend its decree is ousted by the confirmation, modification or variance of such decree on appeal.

C. Unikanda Menon for Petitioner.

D. A. Krishna Variar and *C. Vasudeva Mannadiar* for Respondent.

K.S.

Yahya Ali, J. Appu *alias* Theyyan *v.* Kochunni Nayar.
24th April, 1946. C.R.P. No. 1235 of 1945.

Civil Procedure Code (*V of* 1908), *section* 115—*Order refusing to excuse delay in filing an appeal—Not open to revision.*

An order refusing to excuse delay in filing an appeal is not open to revision. A.I.R. 1914 Mad. 149, *followed*. Even viewed as an order declaring the appeal to be time barred it is not revisable. [See Ruling of *Sankaran Nair* and *Sadasiva Ayyar, JJ.*, in L.P. Appeal No. 82 of 1911.]

C. K. Viswanatha Aiyar for Petitioner.

K. Kuttikrishna Menon and *V. Balakrishna Eradi* for Respondent.

K.S.

Yahya Ali, J. Veerabhadra Rao *v.* Sambasivaramaraju.
25th April, 1946. A.A.O. No. 539 of 1945.

Civil Procedure Code (*V of* 1908), *section* 65—*Sale of same item of property to different persons in execution of different decrees —Rights of rival purchasers—Priority.*

A property shall be deemed to have vested in the purchaser in the sale in execution of a decree from the time when the property is sold and not from the time when the sale becomes absolute by being confirmed. Accordingly, where the same item of property is sold in execution of two different decrees to different persons the purchaser under the earlier sale gets a prior title though his sale is confirmed two days later than the subsequent sale in favour of the purchaser in execution of the other decree. Illustration in Mulla's Civil Procedure Code, 11th Edition, page 265, propounds an erroneous view of law.

P. V. Vallabhacharyulu for Appellant.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondent.

K.S.

Bell, J. Chinnasami Thanjiroyar *v.* Pichai Maricar.
26th April, 1946. C.R.P. No. 705 of 1945.

Practice—Witness disclosing during his examination existence of some account books of his—Court if can order him to produce them and inflict summary penalty of fine for their non-production.

In a Civil suit, where a witness discloses, accidentally perhaps and may be to the surprise of the counsel who had called him, that he has in his possession books of account which may throw light on the case, it is for that counsel to take steps to see that they are produced as soon as possible lest their non-production, after the fact of their existence has been stated by his own witness, leaves the Court to draw an inference against his client and endangers his whole case. It is not a matter for interference by the Court, beyond, may be, a suggestion that the party concerned might do well to cause the production of the books. If either party needs the assistance of the Court in procuring documentary evidence the Court may make orders in accordance with the rules (Order XIII and Order XVI, Civil Procedure Code). In proper cases the Court may inflict penalties on those who

disobey orders made in accordance with the rules. But the Court cannot summarily inflict a fine upon the witness for non-production of the accounts and on default order his property to be sold. Such an order being without jurisdiction a second appeal is not barred. Section 104 (*h*) of the Civil Procedure Code applies only to orders made under any of the provisions of the Code.

Limits to power under section 165, Evidence Act to order production of documents pointed out.

S. Ramachandra Aiyar for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

K.S.

Rajamannar, J. Elaya Pillai *v.* Ramasami Jadaya Goundan.
26*th April*, 1946. C.R.P. No. 28 of 1946.

Impartible estate—If holder can sue for declaration that his lease and promissory note were not binding on the successor—Suit by holder for declaration that a promissory note and lease executed by him were not binding on him on the ground that they were vitiated by coercion, undue influence and fraud—Death of plaintiff—Legal representatives if can amend plaint by saying that the lease and promissory note were not binding beyond the life time of the predecessor in the absence of necessity.

Where a plaintiff, the holder of an impartible estate, sues for a declaration that a promissory note and lease executed by him in favour of the defendant were not binding on him as they were vitiated by coercion, undue influence and fraud, his successor impleaded as legal representative cannot amend the plaint by saying that the lease and promissory note were not binding beyond the life time of his predecessor in the absence of necessity. It is not open to the holder of an impartible estate to institute a suit for a declaration that an alienation made by him is not binding on his successors after his life time. 37 M.L.J. 65, distinguished. As it would not have been open to the original plaintiff to raise such a plea the legal representative cannot raise it either. Moreover the amendment will introduce a cause of action different from that on which the suit was originally laid.

42 M.L.J. 43, relied on.

I.L.R. 48 Cal. 832 (P.C.) referred to.

K. S. Sankara Aiyar for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) and *K. Srinivasan* for Respondent.

K.S.

Chandrasekhara Aiyar and *Kuppuswami Ayyar, JJ.* Nachimuthu Goundan, *In re.*
28*th May*, 1946. R.T. No. 60 of 1946.

Penal Code (*XLV of* 1860), *section* 34*—Applicability—Essentials—Common intention developing in the course of offence—Conviction of all the accused—Propriety.*

The decision of the Privy Council in *Mahbub Shah* v. *Emperor*, (1945) 2 M.L.J. 144 is warrant only for the proposition that it is not enough to attract the provisions of section 34 of the Indian Penal Code that there was the same intention on the part of several people to commit a particular criminal act or a similar intention but it is necessary before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done. Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of the assailants. The question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from the proved facts and not on any direct evidence about a preconceived scheme or plan which may not be available at all.

K. S. Jayarama Aiyar, C. K. Venkatanarasimham, K. Narayanaswami, V. V. Radhakrishnan, and *M. Srinivasagopalan* for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J., Annamalai Chettiar and others *v.* Kuttigan
8th July, 1946. *alias* Muniappa Naicken and others.
S.A. No. 1468 of 1945.

Madras Estates Land Act (I of 1908), *sections* 140 *and* 189—*Suit by* Mittadar *against* Dasabandamdar *for recovery of expenses of repairing tank—Jurisdiction of Civil Court whether barred—Repairs effected in pursuance of order under Madras Railway Protection Act (IV of* 1886)—Dasabandamdar—*If liable for expenses incurred by* Mittadar.

The Collector of the District acting under the Madras Railway Protection Act called upon the *Mittadar* to effect various repairs to a tank, for ensuring the safety of the Railway line. The *Mittadar* effected the repairs, and sued to recover the cost of repairs from the *Dasabandamdar*. It was found that while some portion of the work consisted in normal repairs to the tank, the substantial portion of it consisted in extending the weir for the purpose of protecting the Railway line.

Held, (1) that the jurisdiction of the Civil Court was not ousted under sections 140 and 189 of the Estates Land Act as those sections will apply only if orders had been passed under the preceding sections 136 to 139;

(2) and that the *Dasabandamdar* was under no obligation to effect repairs required for the protection of Railway and that the claim of the *Mittadar* could succeed only to the extent of normal repairs, and that the rest of the claim should be disallowed.

Ch. Raghava Rao for Appellants.

T. L. Venkatarama Aiyar, for Respondents.

K.S.

Horwill, J. Venkatasubbiah *v.* Achattiar.
8th July, 1946. C. R. P. No. 1186 of 1945.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 89—*Deposit by debtor mentioning poundage and commission which together exceeded the amount mentioned as due in the sale warrant—Sufficiency.*

A judgment-debtor applying under Order 21, rule 89, to have a sale in execution set aside has to deposit the amount specified in the proclamation of sale. It is unnecessary to pay anything beyond the amount shown at the time of filing his petition though it will be necessary for him to pay the other sums due as poundage, etc., before the Court sale is set aside. It is immaterial that certain amounts were specifically mentioned to be due as poundage and commission in the particulars of deposit. The particulars of deposit must be treated as merely for the purpose of showing how the figure had been arrived at and not as amounting to an appropriation under the various heads so as to preclude the Court from holding that a sufficient amount had been paid.

21 M.L.J. 631, considered.

It cannot be said that the judgment-debtor cannot be allowed to take advantage of a mistake made in the proclamation of sale as to the amount.

A.I.R. 1934 Lah. 790, dissented from.

The amount shown in the proclamation of sale is the amount that has been judicially determined and is therefore binding on the parties unless they get it altered. The burden is not on the judgment-debtor of checking the figure judicially determined.

S. Panchapakesa Sastri and *T. V. Viswanatha Aiyar* for Petitioner.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondents.

K.S.

Kuppuswami Ayyar, J. Rosayya *v.* Rosayya.
8th July, 1946. S. A. No. 1305 of 1945.

Practice—Second appeal—Judgment referring to evidence admissible as against one of the defendants but not against the others—Interference—Evidence Act (I of 1872), *section* 157—*Recital in document executed by witness as to possession—If corroborative evidence.*

A document which is admissible in evidence as against a particular individual has necessarily to be referred to in the judgment, and it cannot be said that, merely because the judgment makes reference to a particular document which is admissible as against one of the defendants, the judgment as against the other defendants is based on that document so as to warrant interference in second appeal especially when there is other evidence also to support the judgment. Where one of the executants of a document has been examined as a witness the recital in the document about the property in dispute can be relied upon as corroborative of the evidence given by the party to the document.

Ch. Raghava Rao for Appellants.

P. Satyanarayana Rao for Respondents.

K.S.

Horwill, J. Chella Muthriyan *v.* Chola Muthriyan.
8th July, 1946. C. R. P. No. 1111 of 1945.

Practice—Partition suit—Preliminary decree that plaintiff was entitled to his share free of the encumbrance set up by a mortgagee from other coparceners—Final decree—Notice to contesting mortgagee—If essential.

Where in a suit for partition a preliminary decree is passed and in conformity with the customary practice a final decree is not passed immediately but the suit is closed temporarily until reopened at the instance of the decree-holder, it will be necessary in the interests of justice that every person who was a party to the suit should receive notice that the Court intended to continue the suit and pass a final decree. Notice is esse .tial to a contesting mortgagee before final decree is passed.

M. S. Vaidyanatha Aiyar for Petitioner.

T. V. Ramanatha Aiyar for Respondents.

K.S.

Chandrasekhara Aiyar, J. Elumalai Reddi *v.* Krishnaswami Naidu.
9th July, 1946. S. A. No. 1905 of 1945.

Contract—Agreement to sell immovable property—Time if of the essence of the contract—Presumption—Nature of.

That time is not the essence of the contract in cases relating to agreements to sell immovable property is only a presumption, capable of being rebutted. It can be dislodged by proof of surrounding circumstances from which it could be inferred that in a particular case, the time limited was intended by the parties to be enforced. Where only a small sum still remained to be paid by the vendee as balance of the consideration for the sale and he had as much as one year's time for payment, it is not a case where the presumption can well be invoked by the vendee suing for specific performance.

I.L.R. 40 Bom. 289 and 30 C.L.J. 224, considered.

K. Umamaheswaram for Appellant.

N. Panchapakesa Aiyar for Respondent.

K.S.

Horwill, J. Venkata Reddi *v.* Dasaradharamamurti.
15th July, 1946. C. R. P. No. 421 of 1945.

Succession Act (XXXIX of 1925), section 214 (2)—Decree for arrears of rent of agricultural land, interest thereon and costs—Executability by legatee of decree-holder without succession certificate.

A legatee of a decree-holder can execute a decree for rent in respect of land used for agricultural purposes, interest and costs, without a succession certificate. The decree cannot be said to be one for the payment of a debt and the original character of the liability is not altered. The interest may be regarded as an accretion to the rent and costs are a consequence of a successful suit.

18 I.C. 495, referred to.

Alladi Kuppuswami for Petitioner.

K. Umamaheswaram for Respondent.

K.S.

Kuppuswami Ayyar, J. Komaraswami Goundan *v.* Easwaramurthi Goundan.
8th July, 1946. A. A. A. O. No. 231 of 1945.

Provincial Insolvency Act (*V of* 1920)—*Sale of property in execution of mortgage decree —Private sale of same property by Official Receiver for a higher price and deposit of such money for setting aside the prior sale in execution—Subsequent offer by other creditors of still larger amounts—If ground for setting aside the private sale by the Official Receiver.*

Where the Official Receiver entered into an agreement with the leave of the Insolvency Court for a private sale to a creditor of property which had been sold in execution of a decree against the insolvent and awaiting confirmation and utilised part of the consideration for depositing into Court for getting the execution sale set aside, the Court will not be justified in interfering with such a sale merely because some other rival creditors taking advantage of the execution sale being set aside offered to buy the property at a still higher price. Merely because a sleeping creditor wakes up and offers a larger amount, the Court will not be justified in interfering with the sale especially when it had taken due care and had satisfied itself about the need for the agreement entered into by the Official Receiver.

J. R. Alwar Naidu and *G. R. Jagadisa Aiyar* for Appellant.

D. Ramaswami Aiyangar and *S. Kuppuswami* for Respondent.

K.S.

Kuppuswami Ayyar, J. Lakshmayya *v.* Venkateswarulu.
9th July, 1946. S. A. No. 1740 of 1945.

Hindu Law—Contract for sale of family property by manager—Specific performance —If can be refused on the ground that there are minor coparceners—Alienations by guardian of minor and alienations by manager of joint Hindu family—Distinction.

So far as alienations by guardians of minors are concerned it is now well established that specific performance of such a contract can be refused in the discretion of the Court if the minor should object to it on the ground that there is no mutuality. But such objection cannot be raised in respect of contracts entered into by persons on behalf of joint Hindu families even though some of the members of the joint Hindu family were minors. Accordingly in the case of contracts entered into by a manager of a joint Hindu family on behalf of the family, the contract could be specifically enforced even against the minor members of the family.

I.L.R. 57 Cal. 268, not followed ; 54 M.L.J. 412 and (1944) 1 M.L.J. 147, distinguished ; 4 M.L.J. 9 ; 23 M.L.J. 610 ; (1937) 2 M.L.J. 653 ; I.L.R. 47 Mad. 692 ; 2 P.L.J. 513 ; I.L.R. 57 All. 374 and 39 Cal. 232, relied on ; I.L.R. 1940 Mad. 852, referred to.

The Court will not be justified in using its discretion and refusing specific performance and directing the plaintiff to receive the money paid by him in respect of the debts found to be binding on the sons of the manager.

Konda Kotayya for Appellant.

P. Somasundaram for Respondent.

K.S.

Horwill, J. Krishna Rao *v.* Krishnammal.
9th July, 1946. C. R. P. No. 118 of 1946.

Court-Fees Act (*VII of* 1870), *section* 7 (*iv*) (*d*)—*Madras proviso—Applicability.*

Where in a suit against her son praying for an injunction to restrain him from interfering with her possession of the suit house, the defendant in effect denied the plaintiff's absolute right in the suit house,

Held, that the Madras proviso to section 7 (*iv*) (*d*) of the Court-Fees Act would apply.

K. C. Srinivasan for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *K. Subba Rao* for Respondent.

K.S.

N R C

Horwill, J. — Varadaraja Ayyar *v.* Kailasam Ayyar.
10th July, 1946. — S. A. No. 726 of 1945.

Registration—Mistake in entering a charge or mortgage in the wrong book—Subsequent alienee—If bound by the charge or mortgage.

The fact that the registration department makes a mistake in entering a charge or a mortgage in the wrong book does not invalidate the mortgage. Where a subsequent alienee abstained from making any enquiry or search, the previous charge or mortgage though entered in a wrong book would be binding on him as he must be deemed to have had notice. The later alienee cannot be said to be injured by the negligence of the earlier charge-holder when he made no enquiry of any kind but contented himself by the mere asseveration by the alienor that there was no encumbrance on the property. If the subsequent alienee had applied for an encumbrance certificate and had been told that there was none and had taken on that representation by the Registrar then he could say that he was injured by the negligence of the earlier encumbrancer.

N. A. Krishna Aiyar and *S. R. Subramanyam* for Appellant.

N. R. Sesha Aiyar and *S. Venkatachala Sastri* for Respondent.

K.S.

Yahya Ali, J. — Kondala Rao, *In re.*
18th July, 1946. — Cr. R. C. No. 219 of 1946.
(Cr. R. P. No. 212 of 1946).

Drugs Control Order (1943), *section* 9 (*a*) *read with Defence of India Rules, rule* 81 (4) *as it stood before its amendment on* 17*th July*, 1945—*Sale in contravention of Control Order by servant or agent of dealer—Liability.*

Section 9 (*a*) of the Drugs Control Order refers only to wholesale or retail dealers and not to their servants or clerks. Rule 81 of the Defence of India Rules does not carry the matter further. The rule was amended on 17th July, 1945, so as to bring within the operation of section 9 of the Drugs Control Order, servants, agents, etc. But until the date of such amendment persons other than wholesale or retail dealers were not within the purview of the Drugs Control Order. The case cannot be brought within the purview of rule 127 of the Defence of India Rules (making the abetment or attempt to abet, a contravention of the provision) and a conviction based on that rule where the charge did not refer to rule 121 at all is unsustainable.

K. Krishnamurthi for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J. — Muthukrishnayyar *v.* Velammal.
18th July, 1946. — C. R. P. No. 609 of 1945.

Contract Act (*IX of* 1872), *section* 70—*Co-owner incurring expenses for repairs and improvement of irrigation well—Right to recover contribution from the other co-owners.*

A co-owner incurring expenses for repairs and improvement to an irrigation well though not with the consent of the other co-owners is entitled to recover contribution proportionate to their shares from the other co-owners who have enjoyed the benefits of the improvement.

(1942) 2 M.L.J. 300 : I.L.R. (1943) Mad. 158 (F.B.), relied on ; 45 I.C. 786 held to be no longer good law and not followed.

V. Ramaswami Aiyar for Petitioner.

G. R. Jagadisa Aiyar and *J. R. Alwar Naidu* for Respondent.

K.S.

Horwill, J. Subramania Vadiar *v.* Sreenivasa Vadiar.
10th July, 1946. S. A. No. 729 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 8—*Permission to sue on behalf of a body—If can be re-agitated in appeal.*

It cannot be said that when a Court grants permission to a person to represent a body that decision is binding on the parties and cannot be re-agitated at any other stage of the suit or appeal. When a person who brings the suit is not entitled to represent the community at all, it is open to the appellate Court to hold that the trial Court ought not to have permitted the plaintiff to file the suit.

A.I.R. 1932 Bom. 65, distinguished and 47 M.L.J. 560, relied on.

G. S. Swaminathan for Appellant.

C. K. Viswanatha Aiyar for Respondent.

K.S.

Chandrasekhara Aiyar, J. Ramaswami *v.* Sanyasi.
10th July, 1946. S. A. No. 145 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 32, *rule* 15—*Suit proceeded with against defendant on the basis that he was insane with his wife as guardian* ad litem—*Absence of inquiry—Effect on decree.*

When there is an application seeking the appointment of a guardian *ad litem* for a person alleged to be of unsound mind, an inquiry must be held and it is not open to the Court to come to the conclusion without any such enquiry that the person was insane. Where however a suit proceeded on the footing that the defendant was insane with his wife representing him as his guardian *ad litem,* if it could be shown that the defendant was aware of what was happening and took no steps either before or after the decree to protect his own rights, there is no reason why the law should be stretched in his favour or for holding that the decree under such circumstances is not binding on him. The mere absence of an enquiry contemplated in Order 32, rule 15 will not render the proceedings an entire nullity.

P. Somasundaram and *P. Suryanarayana* for Appellant.

C. Rama Rao for Respondent.

K.S.

Chandrasekhara Aiyar, J. Mallikarjunudu *v.* Indo-Carnatic Bank, Ltd.
15th July, 1946. A. A. O. No. 664 of 1945.

Res judicata—*Persons brought on record as legal representatives in execution proceedings remaining* ex parte—*If barred from subsequently questioning the liability of the properties to attachment.*

If there was no notice of attachment of the properties, to persons who were brought on record as legal representatives of the deceased judgment-debtor and if all that could be proved against them was that they remained *ex parte* when notices went to them for settlement of the terms of sale proclamation, this would not prevent them by any doctrine of *res judicata*, constructive or otherwise, from subsequently raising the question of the liability of the properties for the debt.

N R C

I.L.R. 46 Mad. 768 : 45 M.L.J. 346 (F.B.), relied on. (1944) 1 M.L.J. 494, considered.

P. Somasundaram and *P. Suryanarayana* for Appellant.

S. Ramachandra Aiyar and *K. Venugopala Aiyangar* for Respondent.

K.S.

Horwill, J. Bengal Nagpur Railway *v.* Ramaswamy.
17th July, 1946. S. A. No. 466 of 1945.

Railways Act (*IX of* 1890), *section* 75—*Applicability—Goods loaded by consignor in waggon but not in parcels or packages—Effect.*

Section 75 of the Railways Act applies only when parcels and packages are delivered to the railway company, each parcel or package containing articles of value exceeding Rs. 100. Where however there was no parcel or package and the articles (glass bangles) loaded in the waggon were declared and valued, so that the railway authorities saw what they were carrying, section 75 of the Railways Act will not apply and the damages that can be claimed for breakage of the goods cannot be limited to Rs. 100.

C. Krishnaswami Aiyar instructed by *King and Partridge* for Appellant.

B. V. Subramaniam for Respondent.

K.S.

Horwill, J. Abbayee *v.* Suryanarayana.
17th July, 1946. C. R. P. Nos. 30 and 31 of 1946.

Civil Procedure Code (*V of* 1908), *section* 51 *and Order* 21, *rule* 40—*Procedure to have the judgment-debtor committed to prison.*

Order 21, rule 40 of the Code of Civil Procedure makes the procedure quite clear when a decree-holder is desirous to have the judgment-debtor committed to prison. In the first place notice must go to him. Then if he fails to appear in answer to the notice, the Court may, if the decree-holder so wishes order his arrest. He is then brought before the Court which should take the evidence of the decree-holder in support of his application and give the judgment-debtor an opportunity of showing cause why he should not be committed to civil prison. Then under sub-rule (3), the Court may commit the judgment-debtor to detention in a civil prison subject to the provisions of section 51. Section 51 contains the mandatory provision that the judgment-debtor shall not be committed to prison unless the Court is satisfied *for reasons recorded in* writing that the judgment-debtor should be committed to prison for one of the five reasons set out in the section. Under Order 21, rule 37 (2), where appearance is not made in obedience to the notice the Court *shall* if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Where however the judgment-debtor did appear in obedience to the notice, but failed to appear on the adjourned date when the matter came up for inquiry and arrested but released when he was brought before the Court, on his undertaking to file an insolvency petition, he has nothing to complain of and the High Court will not interfere in revision on the ground that the warrant was issued without recording the reasons in writing.

D. Narasaraju for Petitioner.

M. V. Nagaramayya for Respondent.

K.S.

Chandrasekhara Aiyar, J. M'ook Pillai *v.* Valevanda Pillai.
18th July, 1946. S. A. No. 194 of 1945.

Civil Procedure Code (V of 1908), *Order* 1, *rule* 8—*Applicability to appeals—Practice—Amendment—Plaint in individual capacity—Amendment into one in a representative capacity—If permissible at the stage of appeal.*

Hindu Law—Reversioner party to transaction by widow—Estoppel.

An amendment of a plaint can be made at any stage so long as it does not alter the nature or the character of the suit or the cause of action and there is nothing which prevents a Court from permitting persons suing in their individual capacity to sue as representatives of a larger group, even during the stage of appeal. When the appellate Court finds that an amendment of this kind which does not materially change the substance of the suit is necessary in the ends of justice, it should be allowed to overcome a technical difficulty in the way of the plaintiffs. Order 1, rule 8 of the Code of Civil Procedure applies to appeals as well as suits.

Where presumptive reversioners who were parties to a transaction and happen to be the actual reversioners, on the death of the widow, it will not be open to them to urge that the transaction does not bind them. Of course if it is a mere *spes successionis* there can be no estoppel; but if there was some antecedent title which was set up, and might prove good or bad ultimately and it was on the basis of this antecedent title, that the compromise was effected, then the transaction ceases to be a transfer of mere *spes successionis* and the doctrine of estoppel comes into play.

35 M.L.J. 459 : I.L.R. 40 All. 487 (P.C.) and L. R. 63 I.A. 155 (P.C.), relied on.

V. Ramaswami Aiyar and *V. Minakshisundaram* for Appellant.

H. Rama Rao for Respondents.

K.S.

Yahya Ali, J. Pathmavathamma, *In re*
19th July, 1946. Cr. R. C. No. 1173 of 1945.
(Cr. R. P. No. 1089 of 1945.)

Criminal Procedure Code (V of 1898), *section* 133—*Preliminary order under should not be made absolute without giving the party aggrieved sufficient opportunity to meet the charge.*

A preliminary order under section 133, Criminal Procedure Code, should not be made absolute without giving the party against whom it is made sufficient opportunity to meet the charge.

M. V. Nagaramayya for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. Veerabhadraswamy, *In re.*
26th July, 1946. Cr. R. C. No. 401 of 1946.
(Case Refd. No. 13 of 1946.)

Criminal Procedure Code (V of 1898), *section* 197 *and Madras Local Boards Act (XIV of* 1920), *section* 227-*A*—*President of Panchayat Board charged with misappropriating subscriptions for war fund collected by him—Sanction of Provincial Government—If essential for prosecution.*

The collection of subscriptions for the war fund cannot be deemed to be an official duty which had to be performed by the President of a Panchayat Board as such and it cannot be held that, after the war fund subscriptions had been collected

—presumably by consent of the respective subscribers—and subsequently misappropriated, the appropriation was while acting or purporting to act in the discharge of his official duty. Section 227-A of the Madras Local Boards Act is not applicable to such a case and the previous sanction of the Provincial Government is not necessary for the prosecution of the President of the Panchayat Board. Under section 227-A it is necessary that the act attributed to the president should have been done or purported to have been done in the discharge of an official duty.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J.
30th July, 1946.

Executive Officer, Panchayat Board, Tadepalligudam *v.* Ayodhyaramayya.

Cr. R. C. Nos. 145 and 146 of 1946.

(Cr. R. P. Nos. 139 and 140 of 1946.)

Madras Local Boards Act (*XIV of* 1920), *sections* 193 *and* 207 *and schedule VII, item* (q)—*Storage and boiling of paddy without licence—If offences.*

The storage and boiling of paddy without a licence do not constitute offences under section 193 of the Madras Local Boards Act and they could not be punishable under section 207 of the Act. They cannot come under the residuary item (*q*) of schedule VII which speaks of a person generally "doing in the course of any industrial process anything which is likely to be offensive or dangerous to human life or health or property" in the absence of evidence to that effect.

B. V. Subramanyam for Petitioner.

S. Ramamurthi for Respondent.

K.S.

Yahya Ali, J.
30th July, 1946.

Executive Officer, Panchayat Board, Tadepalligudam *v.* Ayodhyaramayya.

Cr. R. C. Nos. 91, 92 and 93 of 1946.

(Cr. R. P. Nos. 88, 89 and 90 of 1946.)

Madras Local Boards Act (*XIV of* 1920), *sections* 193 *and* 207—*Occupier burning bricks without licence—Owner of the place if can be made liable.*

It is only using a place for an offensive or dangerous trade without a licence that is made an offence under section 193 of the Madras Local Boards Act. Burning bricks for private purposes does not require a license. Where there is no occupier the obligation to apply for and obtain a licence under section 193 is on the owner, but where there is an occupier who was responsible for doing the act or process which required a licence, it was for him to make the application and in either case, it is the particular delinquent that should be charged under the provisions of section 207 read with section 193. It is for the authority to make enquiries as to who actually used the place for any of the specified purposes and to proceed against such person. Accordingly the owner of a place cannot be convicted for the occupier burning bricks on it without a licence.

B. V. Subramanyam for Petitioner.

S. Ramamurthi for Respondent.

K.S.

Chandrasekhara Aiyar, J.
15th July, 1946.

Hairoon Bibi *v.* The United India Life Insurance Company, Ltd., Madras.
S.A. No. 364 of 1945.

Insurance—Lapsed policy—Insurance company agreeing to revive on payment of premium and penalty—Remittance by money order—Death of insured before amount reaching the company—Policy if revived and in force.

On the non-payment of the quarterly premium due under an insurance policy on the due date or even within the period of grace, the assured wrote to the company asking for an extension of the period of grace and the company in reply asked him to send the premium and interest so that they could send him a receipt. The assured remitted the amount by money order from his village on 28th November, 1939, and the amount reached the company on the 30th November, 1939. But the assured died suddenly on the 28th November, 1939. When a claim was made for payment of the insurance amount, the widow was met with the plea that as the assured was dead before the premium was actually received by the company the policy which had lapsed was not in force and that nothing was therefore due and payable to her. In the circumstances,

Held: The letter from the company asking the assured to remit the amount connotes a remittance by post especially as the assured was a resident of an out of the way village and previous remittances by him were also sent by postal money order. The remittance by post is binding on the company. As soon as the money was put into the post office, following the demand of the company, the lapsed policy revived. That the remitter has under the Postal rules a right to instruct the Post Office not to pay the money to the payee has nothing to do with the question.

V. C. Viraraghavan for Appellant.

K. S. Rajagopala Aiyangar for Respondent.

K.S.

Horwill, J.
23rd July, 1946.

Veeranna *v.* Satyam.
S.A. No. 1276 of 1945.

Hindu Law—Dancing girl community—Legitimate daughter leading promiscuous life—Son of—If entitled to rights of daughter's son under the Hindu law—Illegitimate offspring—Right of succession.

S, a member of the dancing girl community died in 1896, leaving his widow *P* to whom he was lawfully married and two daughters (1) *SA* who died in 1907 and (2) *SB* who died in 1938. Both these daughters led the ordinary life of women of their community and had children whose paternity was unknown. *SA* had only one daughter who had three offspring by promiscuous unions. *SB* had an only son *X* and three daughters by promiscuous unions. *X* claimed the property of his grandfather *S*, as his daughter's son in preference to the daughter's daughters.

Held: Since *X* was not a legitimate son of the daughter *SB*, he cannot be considered under the Hindu law as the daughter's son and he is therefore not entitled to the rights and privileges of a daughter's son. I.L.R. 51 Bom. 784, I.L.R. 3 Pat. 152 and I.L.R. 48 Mad. 944, considered.

Under the Hindu law when a daughter or son is referred to the law givers contemplated only a legitimate son or a legitimate daughter. Illegitimate children have no right at all in succession—except in two classes of cases :—(1) Illegitimate sons of a Sudra and (2) that illegitimate children of a common mother can inherit from one another and from their mother and their legitimate descendants.

V. Viyanna for Appellant.

V. Govindarajachari and *T. V. R. Tatachari* for Respondent.

K.S.

N R C

Horwill, J. Nagayya *v.* Penukonda Co-operative Town Bank, Ltd.
29th July, 1946. C.R.P. No. 423 of 1945.

Limitation Act (IX of 1908), *Article* 96—*Applicability—Mistake in sale held in execution—Claim by auction purchaser for return of the purchase money—Limitation—Starting point.*

In execution of an award in favour of a co-operative society a house was brought to sale. A reversioner of the last male holder of the property put in a claim petition which was dismissed. He filed a claim suit and succeeded in it on 31st March, 1938. An appeal was filed to the District Court which was dismissed on 4th April, 1941 and the widow of the last male holder obtained possession from the auction purchaser on 7th April, 1943. The auction purchaser filed a suit on 23rd January, 1944, for the return of the purchase money. On a question of limitation,

Held : (i) Article 96 and not Article 97 of the Limitation Act applied to the case.

A.I.R. 1941 Mad. 742, relied on.

(ii) Time began to run from 31st March, 1938, the date when the decree of the trial Court was passed and not from 4th April, 1941, the date of the appellate Court decree. When the first Court passed its decree the plaintiff was informed and had knowledge that a mistake had been made. Although there was still the possibility that the appellate Court might reverse the decree of the first Court, yet the plaintiff continued to have knowledge and since the appeal was dismissed, the plaintiff's knowledge continued uninterrupted from the date of the decree of the trial Court.

I.L.R. 46 Cal. 670 (P.C.), 1922 M.W.N. 561 and I.L.R. 45 Bom. 582, referred to.

V. S. Narasimhachar for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Yahya Ali, J. Ramaswami Naicker *v.* Rangaswami Naicker.
2nd August, 1946. Cr.R.C. No. 1109 of 1945.
(Cr.R.P. No. 1026 of 1945).

Criminal Procedure Code (V of 1898), *sections* 259 *and* 350—*Court to which warrant case has been transferred after framing of charges—If can discharge accused when complainant is absent on date fixed for hearing.*

When there is a *de novo* trial under section 350, Criminal Procedure Code the charge already framed is not wiped out. In a warrant case where a charge has been framed the magistrate is not competent in the absence of the complainant to pass an order of discharge under section 259, Criminal Procedure Code, ignoring the charge already framed. Such an order of discharge even if it amounts to an acquittal must be set aside.

Sriramulu v. *Veerasalingam*, I.L.R. 38 Mad. 585 and In re *Ramanna*, 65 M.L.J. 791, relied on.

Sardarkhan Sahib v. *Athanla*, 47 M.L.J. 926 and *Ramalingam Pillai*, In re, 67 M.L.J. 293 : I.L.R. 57 Mad. 1019, not followed.

K. P. Raman Menon for Petitioner.

K. Veeraswami for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. Narayanan Chettiar *v.* Ramanathan Chettiar.
26*th July*, 1946. C.R.P. No. 675 of 1945.

Transfer of Property Act (IV of 1882), *section* 6 (dd) *and* (e)—*Transfer of a personal right to claim arrears of maintenance—Validity—Transferee cannot be impleaded as plaintiff on death of transferor pending her suit for arrears of maintenance.*

A wife filed a suit against her husband for arrears of maintenance and died during the pendency of the suit. But before she died she purported to assign her rights to past maintenance to her father, who applied to be brought on record as the second plaintiff in the suit.

Held : The question of the wife's right to maintenance at all, as well as the quantum of maintenance arose for decision in the suit. There was no question of a suit to recover an ascertained sum. That being so, the plaintiff could not transfer a personal right to claim maintenance to her father. Accordingly the father's application to be impleaded as second plaintiff must be dismissed.

P. Mrithyunjaya Aiyar for Petitioner.

K. Umamaheswaram for Respondent.

K.S.

Chandrasekhara Aiyar, J. Rangiah Chettiar *v.* Parthasarathy Iyengar.
29*th July*, 1946. S.A. No. 1457 of 1945.

Contract—Contract to sell goods—If could be assigned by the seller—Seller's assignee if can sue for damages for breach of contract on refusal of tender of performance by him.

A contract to sell goods could be assigned by the seller so as to enable the assignee to sue for damages for breach of contract on tender of performance by him.

It is difficult to see any distinction in principle between the buyer's right and the seller's right on the subject of assignment. The buyer is under an obligation to pay the price before he can ask for the delivery of the goods ; the seller is under an obligation to deliver the goods before he can ask for the payment of the price. The one right is as much an actionable claim as the other and a transfer is permitted. There is no objection to the seller getting some one else on his behalf to deliver the goods to the buyer and there can equally be no objection to his being authorised to file a suit as the seller's deputy or nominee or agent to enforce his rights. It is not a transfer of a mere right to sue for damages ; it is a transfer of the rights under a contract which is still to be performed on both sides—not after it was broken and a claim for damages has arisen.

Such contracts are being assigned every day in the Madras market and has almost grown into a commercial usage.

The Advocate-General (*K. Rajah Aiyar*) and *V. Seshadri* for Appellant.

V. Govindarajachari and *A. Ramaswami Aiyar* for Respondent.

K.S.

Chandrasekhara Aiyar, J. Satyanarayanamurthi *v.* Veeranna.
29*th July*, 1946. A.A.O. Nos. 431 to 433 of 1945.

Practice—Partition suit—Right of defendants to ask for the determination of their shares and delivery over to them.

In a partition suit, every coparcener, be he the plaintiff or defendant, is really in the position of a plaintiff and he can ask for the determination of his share and

its delivery over to him at any time. There is no rule that there should be only one preliminary decree in a partition suit and not more. It is not necessary to drive the defendants to separate suits. It is open to them to apply for determination of their shares and delivery subsequent to the passing of a preliminary decree in favour of the plaintiff.

P. Somasundaram for Appellants.

B. V. Subramanyan and *K. Bhimasankaran* for Respondents.

K.S.

Kuppuswami Ayyar, J. Kamaraju *v.* Mallayya.
30th July, 1946. S.A. No. 738 of 1945.

Civil Procedure Code (V of 1908), *Order* 1, *rule* 8—*Alienation in fraud of creditors—Only creditor suing in his own right to set aside sale—Leave in appeal to file the suit as representative suit—Grant of—Propriety.*

Where a party knew that he was the only creditor of the alienor whose alienation is sought to be set aside as in fraud of creditors he could represent in his own capacity the creditor. But where the Court finds against him and holds that he must file the suit as a representative suit and in appeal he thinks it necessary and safer to apply for permission to file the suit as a representative suit, having regard to the *bona fide* mistake leave can be granted even in the appeal.

Madina Bibi v. *Ismail Durga Association*, (1940) 1 M.L.J. 872 : I.L.R. 1940 Mad. 808, distinguished.

But an objection that the matter was governed by section 47, Civil Procedure Code, cannot be allowed to be raised for the first time in appeal five years after the suit was filed.

C. Rama Rao for Appellant.

K. Bhimasankaram and *Vepa P. Sarathi* for Respondent.

K.S.

Horwill, J. Lakshmipathi Naidu *v.* Mohamed Ghani.
30th July, 1946. C.R.P. No. 281 of 1945.

Civil Procedure Code (V of 1908), *section* 20 (c)—*Suit for damages for breach of contract—Jurisdiction at place where contract had to be performed in part—Cause of action.*

A suit for a breach of contract can be filed at any place where the contract should have been performed in whole or in part. A suit for damages for breach can be filed at the place either where the goods were deliverable or the price payable. Part of the cause of action arises where the price is to be paid.

M. Ranganatha Sastri for Petitioner.

Ramanujam and *Venkataseshayya* for Respondent.

K.S.

Horwill, J. Veera Pillai, *In re.*
6th August, 1946. S.A. No. 907 of 1946.

Civil Procedure Code (V of 1908), *section* 11—*Suit against Hindu father and sons on a breach of contract—Sons disclaiming any interest in the property which was the subject of the suit and exonerated—Decree passed against father ultimately—Execution against son's share resisted by sons—Suit by decree-holder for possession on the ground that sons were liable under pious obligation theory—Suit not barred.*

Where in a suit against a Hindu father and sons for damages for breach of contract the sons disclaimed any interest in the suit property and were exonerated but subsequently when in execution of the decree against the father alone the son's shares were sought to be attached the sons resisted the decree-holder, a suit for possession against the sons on the ground that under the pious obligation theory they were liable for their father's debt, will not be barred by *res judicata*. The sons were impleaded in the earlier action, not on the ground of their liability for their father's debt—because no debt then existed. The liability of the sons arose directly out of the decree passed against the father and not before. It was only after the Courts had held that there was a breach of contract and that the father was liable in damage and a decree passed that the obligation of the sons arose. Accordingly the question can be properly raised in execution and the possession suit.

Raja Ram v. *Rajah Baksh Singh*, (1938) 1 M.L.J. 41 : I.L.R. 13 Luck. 61 (P.C.), distinguished.

R. Sundaralingam for Appellant.

K.S.

Yahya Ali, J.
7th August, 1946.

The Crown Prosecutor, Madras *v.* Sali Muhammad.
Cr.R.C. No. 215 of 1946.
(Cr. R.P. No. 208 of 1946).

Cotton Cloth and Yarn (Control) Order (1943), *clause* 14 (2)—*Having in stock goods with tex-mark after one year of the stamped date—Offence—Clause* 15-*A—Applicability.*

Clause 14 (2) of the Cotton Cloth and Yarn (Control) Order embodies a prohibition against dealers being in possession of the goods after a prescribed date based upon the direction contained in clause 14 (1) (*b*) that all stock manufactured after a specified date should be disposed of before another specified date. This is an absolute prohibition which, if contravened, attracts the penal provisions contained in the Defence of India Rules. The required machinery which would enable a dealer in possession of unsold goods to keep in his possession and sell such goods after the expiry of the prescribed time, being provided in clause 15-A and the notification of 27th January, 1944, clause 14 (2) cannot be said to be incomplete or unworkable. The two clauses act and are intended to act as complementary provisions. Clause 14 containing the prohibition which will become absolute in the event of the procedure permitted under clause 15-A not being in proper time taken advantage of by the dealer who finds himself in possession of goods which he was, despite his best efforts, unable to sell within the due time.

A.I.R. 1945 Nag. 249, not followed.

The Crown Prosecutor (*Chandra Reddi*) on behalf of the Crown.

Basheer Ahmed Sayeed for Respondents.

K.S.

Happell, J.
8th August, 1946.

Thippayya, *In re.*
Cr.R.C. No. 404 of 1946.
(Case Referred No. 14 of 1946.)

Criminal trial—Tahsildar who had given evidence for prosecution succeeding the magistrate who was trying the case—Propriety of trying such case—Consent of accused to such trial—Effect.

A tahsildar who gave evidence for the prosecution succeeded the Magistrate who was trying the case and proceeded with the trial of the case and convicted the accused. The accused appealed to the Sessions Judge who set aside the conviction

and remanded the case directing it to be re-heard by any other competent Magistrates. But the same Magistrate took up and continued the trial with the consent of the accused.

Held: The Magistrate should never have tried the case in view of the fact that he had himself given evidence in it. The consent of the accused cannot validate a trial that was manifestly improper.

A. Bhujanga Rao for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J.
8th August, 1946.

Nataraja Nadar, *In re.*
Cr.R.C. No. 493 of 1946.
(Cr.R.P. No. 473 of 1946).

Criminal Procedure Code (*V of* 1898), *section* 202—*Police report under—Right of accused to a copy.*

A copy of the police report under section 202, Criminal Procedure Code, should be granted to the accused if a report under that section had been made.

G. Gopalaswami and *S. Venkatachalam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J.
9th August, 1946.

Hussain Bhai, *In re.*
Cr. R.C. Nos. 200 and 201 of 1946.
(Cr.R.P. Nos. 194 and 195 of 1946.)

Hoarding and Profiteering Prevention Ordinance, (1943) *section* 6—*Profit of* 20 *per cent.—Computation—Absent partner—If can be liable as dealer.*

Section 6 of the Hoarding and Profiteering Prevention Ordinance does not limit the profit of 20 per cent. above the price at which the producer sold the article to the person charged, but limits the profit to 20 per cent. above the price at which the producer sells the article to any person.

The term dealer in section 6 of the Ordinance covers all the members of a firm and a partner even if he is absent when the sale complained of takes place will be liable. Such absent partners will be liable even for the failure of their agent or salesman to give a cash memorandum.

B. Jagannadha Das and *C. V. Dikshitulu* for Petitioners.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Yahya Ali, J.
9th August, 1946.

Raman, *In re.*
Cr.R.C. No. 234 of 1946.
(Cr.R.P. No. 227 of 1946).

Defence of India Rules, rule 75-*A* (7) *and rule* 119 (1)—*Tender of notice requiring the person to furnish information as to paddy—Refusal of notice—Prosecution for contravention of notice.*

Where the accused refused the notices under rule 75-A (7) of the Defence of India Rules requiring them to furnish information as to paddy in their possession, and the notice is fixed to the door of the house there is service of the notice. In any case under rule 119 (1) of the Defence of India Rules when such tender has been made, the person concerned would be deemed to have been duly informed of the order and can be convicted for contravention of the order.

K. S. Jayarama Aiyar and *C. K. Viswanatha Aiyar* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J. Chockalinga Gramani *v.* The Collector of Madras.
9th July, 1946. A. A. O. Nos. 691 and 723 of 1945.

Defence of India Act (1939), *section* 19—*Arbitration award in respect of property occupied under sub-clause* (2) *of rule* 78 *of the Defence of India Rules—Appeal to High Court not barred.*

An appeal to the High Court against the award of an arbitrator as to compensation for property occupied under sub-clause (2) of rule 78 of the Defence of India Rules is not barred by section 19 of the Defence of India Act. Rule 78, sub-clause (2) is a rule made under the Act and action taken under the rule amounts in substance to requisitioning the property by directing the doing of any work on the land or by placing anything in or over the land. It is therefore not a case to which the provisions of section 19 of the Defence of India Act can be said to be inapplicable.

I. Chakrapani for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) instructed by the Crown Solicitor (*H. M. Small*) for Respondent.

K.S.

Happell, J. Achyuta Ramayya *v.* Akkayya.
25th July, 1946. C. R. P. No. 727 of 1945.

Madras Estates Land Act (*I of* 1908), *section* 3 (2) (1)—*Subsequent grant out of a larger grant by the grantee which had been separately confirmed at the time of the inam settlement—If an estate.*

Where there is a subsequent grant out of a larger grant by the grantee (mokhasadar) which had been separately confirmed at the time of the inam settlement, the subsequent grant cannot be said to be a portion of an estate. As the minor inam was confirmed separately it was not included in the inam which was confirmed as a whole and could not be regarded as a part of the estate which that inam is by virtue of the confirmation. *Viswanathan Brothers* v. *Subbayya,* (1945) 1 M.L.J. 443, followed.

S. Ramamoorthy for Petitioner.

K. Subba Rao for Respondent.

K.S.

Kuppuswami Ayyar, J. Vaithilingam Pillai *v.* Ganapathi Pillai.
29th July, 1946. A. A. A. O. No. 82 of 1945.

Provincial Insolvency Act (*V of* 1920), *section* 43—*Annulment of adjudication—Effect on prior execution proceedings against debtor started without sanction of Insolvency Court—Such application if saves limitation as one made in accordance with law.*

An absolute annulment, of an adjudication found to have been made on improper grounds, has the effect of validating all acts done during the interval without leave of the Insolvency Court. The acts have to be considered to be valid by treating them as done at a time when there was no adjudication. Accordingly an application for execution commenced without the sanction of the Insolvency Court against such a debtor before the annulment of his adjudication must be deemed to be one in accordance with law and would save limitation. *Ratnavelu Chettiar* v. *Franciscu Udayar,* (1945) 1 M.L.J. 472, relied on.

N. Suryanarayana and *R. Rajagopala Aiyar* for Appellant.

M. S. Vaidyanatha Aiyar for Respondent.

K.S.

Chandrasekhara Aiyar, J. Varadachariar *v.* Thiruvenkatachariar.
5th August, 1946. A. A. O. No. 393 of 1945.

Madras Estates Land Act (*I of* 1908), *section* 189—*Senior proprietor of a village distraining movable property of another proprietor for contribution for alleged arrear of land revenue—Suit for damages for wrongful distraint—Jurisdiction of Civil Court.*

The plaintiff was one of the proprietors of a village. The defendant the senior proprietor wrongfully distrained the plaintiff's movables, for contribution in respect of an alleged arrear of land revenue. In a suit by the plaintiff for damages,

Held, that the Civil Court has jurisdiction to try the case. It is only in so far as jurisdiction is expressly conferred by the Madras Estates Land Act on the revenue Courts under section 189 of that Act that the jurisdiction of the Civil Court is taken

away. Section 213 of the Act has obviously no application to the case. Section 134 of the Act is also inapplicable to the case. Accordingly the Civil Court has jurisdiction to try the case and it cannot be said that it fell within the jurisdiction of the Revenue Court.

C. Narasimhachari and *C. Krishnamachari* for Appellant.

N. Suryanarayana for Respondent.

K.S.

Kuppuswami Ayyar, J. Nagaraju *v.* Parvatamma.
7th August, 1946. S. A. No. 779 of 1945.

Husband and wife—Suit against husband for maintenance—Adjournment to enable parties to see if they could live together—Subsequent reporting after living together that it was impossible—Cause of action if wiped out.

Where in a suit by a wife for maintenance against her husband some time is granted to the parties to see if it would be possible for them to live together but subsequently they report that they could not live together the wife's cause of action is not wiped out by their living together and a decree in her favour can be passed in her favour. *Venkataramaraju* v. *Rajagopalaraju*, (1945) 2 M.L.J. 641, distinguished.

E. Venkatesam for Appellant.

D. V. Reddi Pantulu for Respondent.

K.S.

Yahya Ali, J. Kunhamal Kunhambu, *In re.*
9th August, 1946. Cr. R. C. No. 324 of 1946.
(Cr. R. P. No. 313 of 1946).

Food Grains Control Order, rule 3—Private individual purchasing a little over two maunds of food grains for personal consumption—Sale and purchase—If offences.

The sale to a private individual of a little over two maunds of food grains for his personal consumption is not prohibited by rule 3 of the Food Grains Control Order. Such a buyer is not affected by clause 5 (2) of the licence to the dealer forbidding the sale of any quantities exceeding 2 maunds to any person who is neither a seller nor a retail dealer nor a miller.

K. S. Jayarama Aiyar and *M. M. Santosh* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. Lachanna *v.* Kannayyamma.
15th August, 1946. Cr. R. C. No. 85 of 1946.
(Cr. R. P. No. 82 of 1946).

Criminal trial—Charge of offences under sections 426 *and* 352, *Penal Code—Summons procedure followed up to a certain stage—Evidence disclosing offences under sections* 379 *and* 352 *of the Penal Code—Adoption of the warrant case procedure—Propriety.*

If a magistrate begins a trial as a summons case and then finds that an offence triable only by warrant case procedure has been committed, he is bound to apply the warrant case procedure thenceforward and he is not in any way disqualified from proceeding with the trial.

Rajaratnam Pillai v. *Emperor*, (1936) 70 M.L.J. 340 : I.L.R. 59 Mad. 442, not followed. *Venkatarama Aiyar* v. *Varadarajulu Chetty*, (1938) M.W.N. (Cr.) 109 and *Malai* v. *Emperor*, (1937) M.W.N. 987, relied on.

Where the accused were indicted under sections 426 and 352 of the Indian Penal Code and the summons procedure was followed up to a certain stage but subsequently the trying magistrate felt that the evidence disclosed offences under sections 379 and 352 of the Penal Code the trying Magistrate can adopt the warrant case procedure. It cannot be said that under sections 244 and 245 of the Code of Criminal Procedure the Magistrate was bound at the stage when he attempted to convert the summons case into a warrant case when he found that no case had been made out under section 426 of the Indian Penal Code, to acquit the accused and that he was not entitled to register a case under section 379 of the Indian Penal Code and proceed under Chapter XII of the Criminal Procedure Code.

E. Venkatesam for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
1st August, 1946.

Rahima Bibi *v.* Sherfuddin
S.A. No. 1639 of 1945.

Contract Act (*IX of* 1872), *section* 68—*Person spending money for marriage expenses of minor Muhammadan girl—If entitled to recover the amount as advanced for minor's "necessaries"—Marriage—How far a "necessary" under Hindu and Muhammadan law.*

Marriage is a "necessary" for a Muslim minor girl and a person spending such money as was necessary for the marriage not intending to do so gratuitously is entitled to relief under section 68 of the Contract Act and can reimburse himself from the minor's estate. Although the principle enunciated in section 68 of the Contract Act would not apply to the expenses of marriage of a minor under the English law, the principle has been extended in India to cover the marriage expenses of Hindu minors and in the case of a Muslim minor girl also marriage is a "necessary" that would come within the purview of section 68 of the Contract Act.

Marriage, how far a "necessary" under Hindu and Muhammadan law respectively discussed.

[*Authorities discussed*].

T. V. Ramanatha Aiyar and *S. Rajaraman* for Appellant.

K. S. Sankara Aiyar and *V. Sundaresan* for Respondent.

K.S.

Chandrasekhara Aiyar, J.
2nd August, 1946.

Kandaswami *v.* Neelamegam Pillai
A.A.A.O. No. 92 of 1946.

Madras House Rent Control Order (1941), *clause 7-A* (*2-A*)—*Order of Rent Controller—Execution of by Principal Subordinate Judge—Appealability—Civil Procedure Code* (*V of* 1908), *section* 47—*Applicability.*

An order of the Rent Controller has to be executed by the Principal Subordinate Judge as if it were a decree of his court and this means that for purposes of execution it should be regarded as a decree of the Subordinate Judge. Once we reach this position it is difficult, if not impossible, to resist the applicability of section 47 of the Civil Procedure Code.

If by virtue of a special enactment, an order of a particular tribunal is to be treated as an order of a regular Court for certain purposes, then the right of appeal is attracted under the general law.

The question really is not so much the conferring of a right of appeal as including within the jurisdiction of the particular Court mentioned a new subject-matter.

Accordingly the parties have a right of appeal from orders of the executing Court, though the order of the Rent Controller himself directing eviction is final and cannot be challenged in the Civil Court.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Appellant.

M. Ranganatha Sastri for Respondent.

K.S.

Rajamannar, J.

9th August, 1946.

Sundararama Rao
v.
Satyanarayanamurthy.
S.A. No. 586 of 1945.

Hindu Law—Adoption by widow—Consent of husband's undivided co-parceners wrongfully withheld—Consent of divided sapinda—Sufficiency for validity of adoption.

If it is established that the undivided co-parcener has wrongfully withheld his consent, the widow can seek and obtain the consent of a divided sapinda and on the authority of such consent make a valid adoption to her husband.

Test of reasonableness or otherwise of the withholding of their consent by coparceners discussed.

V. Govindarajachari and *N. Bapi Raju* for Appellant.

P. Somasundaram, P. Suryanarayana and *V. Parthasarathi* for Respondent.

K.S.

Kuppuswami Ayyar, J.
9th August, 1946.

Sivaramayya *v.* Kantamma.
A.A.A.O. No. 365 of 1944.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 16—*Decree in favour of adopted son—Subsequent declaration in suit between him and his adoptive mother that she was entitled to the decree —If renders her transferee of decree entitled to execute it.*

An adoptive mother cannot be regarded as a transferee of a decree by operation of law entitled to execute it by merely obtaining in her favour a declaration in a subsequent suit against the decree-holder (the adopted son) that she was entitled to the decree by virtue of a devise to her by her husband's will.

(Case-law reviewed).

K. Kameswara Rao for Appellant.

P. Somasundaram for Respondent.

K.S.

Rajamannar, J.

16th August, 1946.

Kelukutty *v.* Narayana Iyer.
S.A. No. 1038 of 1945 and
A.A.A.O. No. 162 of 1945.

Malabar Tenancy Act (*XIV of* 1930), *section* 14 *clause* (5), (*as amended in* 1945)—*Is applicable to pending cases—Landlord examining himself and stating that he* bona fide *wanted the property for his own use—No independent evidence on behalf of tenant—Order for eviction—Propriety.*

The amendment of section 14, clause (5) of the Malabar Tenancy Act in 1945 is retrospective in its scope and the rights of parties to a pending second appeal must be decided according to the section as it now stands. Where the plaintiff in a suit for eviction has examined himself and sworn that he wanted recovery of the property *bona fide* for his own use and cultivation and the defendant contented himself with eliciting in cross-examination the answer "I want to keep the property in my actual possession and to occupy the house", and there was no independent evidence on his behalf, the plaintiff's evidence can be believed and a decision given in his favour.

(1945) 2 M.L.J. 13 explained.

P. Govinda Menon for Appellant.

C. K. Viswanatha Ayyar for Respondent.

K.S.

Shahabuddin, J.
2nd August, 1946.

Sivamurthy *v.* Nagireddi.
C.R.P. No. 736 of 1946.

Madras Hindu Religious Endowments Act (II of 1927), *section* 78—*Jurisdiction of Courts under—Scope of—If limited to admitted endowments.*

There is nothing in the language of section 78 of the Madras Hindu Religious Endowments Act indicating that the Court has jurisdiction under that section only with regard to admitted endowments. The Court will no doubt do well in not entering in such proceedings into questions of title in a complicated case; but if on a consideration of the case, the Court decides to go into that question, it cannot be said that it has exceeded its jurisdiction. If the view that section 78 applies only to admitted endowments is accepted, then that section would be rendered nugatory by the defendant claiming the property as his own.

Kasturi Seshagiri Rao for Petitioner.
B. Lakshminarayana for Respondent.
K.S.

Rajamannar, J.
2nd August, 1946.

Subbaraya Shetty *v.* Ugappa Shetty.
S.A. No. 825 of 1945 and
A.A.A.O. No. 140 of 1945.

Minors—Decree and sale in execution against Aliyasanthana *family—Minor members of family if can avoid decree or sale in execution on the ground of gross negligence of their mother the* Yajamarthi.

Where the mother was the *Yajamarthi* of an *Aliyasanthana* family, she would be entitled to represent the family in any suit or execution of a decree against the family and her minor children cannot avoid the decree or sale in execution on the ground of the gross negligence of their mother in the conduct of that suit. *Krishnamurthi and another* v. *Chidambaram Chettiar and others*, (1946) 1 M.L.J. 58, applied. On principle there is no difference between the manager of an ordinary *Mitakshara* joint family and the *Yajamarthi* under the *Aliyasanthana* Law. The principle that a minor can sue to set aside a decree passed against him in a suit not only on the ground of fraud or collusion but also on the ground of gross negligence on the part of his guardian should not be extended to cover a case where the father is sued as the manager of the family of himself and his sons or the mother is sued as the *Yajamarthi* of the family of herself and her children. That principle should be held to apply in a suit which concerned property held by the minor in his own right and in which a decree is passed against the minor as such.

Venkataseshayya v. *Kotiswara Rao*, (1937) 1 M.L.J. 113 : L.R. 64 I.A. 17 : I.L.R. 1937 Mad. 263 (P.C.), relied on.

C. S. Venkatachariar and *K. P. Sarvothama Rao* for Appellant.
B. Sitarama Rao, A. Narayana Pai, K. Y. Adiga and *K. P. Adiga* for Respondents.
K.S.

Kuppuswami Ayyar, J.
23rd August, 1946.

Pompanna *v.* Siddamallanna Gowd.
A.A.A.O. No. 276 of 1945.

Madras Debt Conciliation Act (XI of 1936 *as amended subsequently), section* 5—*Amended provisions not retrospective.*

The wording of the amended section 5 of the Madras Debt Conciliation Act is clear to indicate that all orders passed before that Act which have the effect of having the debt discharged, have to stand. It is only in respect of future orders the amendment is to have any effect and to confine the consequence of the failure to submit statements by the creditor under section 10 (2) of the Act to cases where the debtor had not admitted the liability.

A. C. Sampath Aiyangar and *T. Rajagopalan* for Appellant.
K. Srinivasa Rao for Respondent.
K.S.

N. R. C.

Yahya Ali, J.
23rd August, 1946.

Srinivasa Rao, *In re.*
Cr. R. C. No. 331 of 1946.
(Cr. R. P. No. 320 of 1946).

Presidency Towns Insolvency Act (*II of* 1909), *section* 103 (*b*) (ii)—*Gist of offence under—Insolvent ordered to pay monthly allocation subsequently earning salary from employment—If bound to disclose his new income to the Official Assignee.*

There is no dispute about the proposition that the after-acquired income of an insolvent over and above what is required for the maintenance of the insolvent and his family becomes property within the meaning of sections 17 and 52 of the Presidency Towns Insolvency Act and that it vests in the Official Assignee. But the principle is well settled that although property belonging to the insolvent at the commencement of the insolvency vests in the Official Assignee forthwith, after-acquired properties do not vest in him unless he chooses to intervene. When an allocation has been made, it cannot be disputed that the excess over that allocation in the personal earnings of the insolvent belongs to him and he has an unfettered right of disposal over it unless it is a case where the Official Assignee considers that there is a considerably wide margin which can be taken over for distribution amongst the creditors, in which case he has to move the Insolvency Court and obtain its orders.

To constitute "concealment" within the meaning of section 103 (*b*) (*ii*) of the Presidency Towns Insolvency Act there must be some act on the part of the insolvent whereby he can be shown to have wilfully kept some property away from the notice or view of the Official Assignee. If there was a duty on his part to disclose or if there was a call on him to disclose and he did not conform to it or gave incorrect particulars that would be a case of "concealment" within the meaning of the rule. But there is no positive duty cast on the insolvent under the statute to notify to the Official Assignee the fact of his having entered into a contract of service and the terms of remuneration.

T. M. Kasturi for Petitioner.

The Crown Prosecutor (*P. Chandra Reddi*) on behalf of the Crown.

K.S.

Yahya Ali, J.
3rd September, 1946.

The Public Prosecutor, Madras *v.* Modi Kodayya.
Cr. App. No. 268 of 1946.

Madras Prevention of Adulteration Act (*III of* 1918), *S.* 5 (1) (*d*) *and Rules framed under—Rule* 29—*Offence punishable under—Gist of—Sale of "hot milk" containing* 13 *per cent. of water and deficient in milk fats and milk solids—If offence—Intention in adding water—Relevancy.*

The fact that the vendor of "hot milk" added water to it merely for the purpose of preventing its boiling over in heating does not prevent its being an adulteration. For establishing the offence of adulteration under the Madras Prevention of Adulteration Act and the rules framed thereunder it is not necessary to prove that the intention was to increase the bulk or measure or to debase the quality or that the intention was of a fraudulent nature. "Milk" is defined in section 2 of the Act as meaning the "normal clean secretion drawn from the udder of a healthy cow or buffalo either completely or, after the first portion of such secretion has been drawn off, to completion." Under section 5 (1) (*d*) it is provided that every person who offers for sale or sells milk which is not up to the standard of purity prescribed by the Local Government shall be punished for the offence. The Act makes no distinction between raw and hot milk and provides no exception in the case of the latter. Accordingly if in respect of hot milk sold or offered for sale it is found that on account of adulteration with water or abstraction, the prescribed minima of milk fat and milk solids are diminished the vendor will be guilty of an offence punishable under rule 29-A as also under section 5 (1) (*d*) of the Act.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for Appellant.

B. T. Sundararajan Amicus curiæ on behalf of the accused.

K.S.

Happell, J. Subrahmanyam *v.* Subbayya.
23rd August, 1946. A. A. A. O. No. 67 of 1945.

Provincial Insolvency Act (V of 1920), *section* 4—*Application under—If equivalent to a suit for purposes of limitation.*

An application under section 4 of the Provincial Insolvency Act is equivalent to a suit for purposes of limitation. *Muthuswami* v. *Official Assignee, Madras*, I.L.R. 59 Mad. 1020 and *Gundappa* v. *Official Receiver, Bellary*, 58 L.W. 665 : (1945) 2 M.L.J. 557, relied on. *Hansraj Gupta* v. *Official Liquidators, Dehra Dun*, 54 All. 1067 : 64 M.L.J. 403 (P.C.), distinguished.

K. Krishnamurthi for Appellant.

V. Suryanarayana and *M. V. Nagaramayya* for Respondent.

K.S.

Kuppuswami Ayyar, J. Sriramulu *v.* Punnayya.
3rd September, 1946. A. A. A. O. No. 261 of 1945.

Provincial Insolvency Act (V of 1920), *section* 78 (2)—*Decree subsisting on date of adjudication—Execution after annulment—Limitation—Exclusion of period when insolvency proceedings were pending—Decree-holder filing execution petition without leave of Insolvency Court—Effect.*

A decree was passed on 27th February, 1939. The judgment-debtor was adjudged insolvent on 10th April, 1939. On 22nd November, 1939, an execution petition was filed without obtaining leave of the Insolvency Court to execute the decree and that petition was ultimately dismissed on 1st March, 1940, as the debtor raised the objection that it was not maintainable without leave of the Insolvency Court. On 30th June, 1941, the adjudication was annulled and an execution petition was filed on 5th February, 1943.

Held, the petition was not barred by limitation as the period between the date of order of adjudication and its annulment must be excluded. The fact that an application was filed without leave of the Insolvency Court would not in any way deprive the decree-holder of his right to have the period from the date of adjudication till the date of the annulment excluded.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

C. Rama Rao for Respondent.

K.S.

Kuppuswami Ayyar, J. Sree Mahant Prayag Dossji Varu *v.* Thurimerla Papi Reddi.
4th September, 1946. A. A. A. O. No. 273 of 1945.

Limitation Act (IX of 1908), *Articles* 181 *and* 182 (5)—*Bond executed by sureties agreeing to pay double the value of articles in case they failed to produce the articles attached and left in their possession whenever called upon to do so—Execution petition against the sureties—Limitation.*

Certain movable articles belonging to a judgment-debtor were attached in execution of the decree but were left on 29th March, 1934, in the custody of sureties who executed a bond agreeing to pay double the value of the articles in case they failed to produce the articles attached and left in their possession whenever called upon to do so. Subsequently the decree-holder applied for the arrest of the sureties for the non-production of the judgment-debtor's movables for sale and it was dismissed on 8th December, 1936, as the sureties could not be found for arrest. Subsequently he filed against the judgment-debtor an execution petition which was dismissed for default on 8th September, 1942. He then filed an execution petition against the sureties.

Held, Article 181 of the Limitation Act applied and the execution petition was not maintainable. It is only when there is a liability for the decree amount it can be said that the application filed against the judgment-debtor will save limitation against the sureties by virtue of clause (5) of Article 182 of the Limitation Act. The liability under the surety bond was an independent liability and has nothing to do with the liability under the decree. 65 M.L.J. 507, *followed*; I.L.R. 58 Mad. 276, *dissented from.*

NRC

A. G. Sampath Aiyangar and *S. Krishnamachari* for Appellant.

P. Srikantam for Respondent.

K.S.

Wadsworth, O.C.J. and *Rajamannar, J.* Dorairaj *v.* Lakshmi.
5th September, 1946. O. S. A. No. 24 of 1946.

Guardians and Wards Act (*VIII of* 1890), *section* 25—*Illegitimate child by continuously kept concubine of Sudra—Father if entitled to custody in preference to the mother.*

The father of an illegitimate son has no right to the custody of the person of that son during his minority. A mere obligation to maintain cannot of itself confer a right to the custody of the minor who is to be maintained. The right of the putative father to the custody of the person of his illegitimate son by a continuously kept concubine does not necessarily flow either from the duty to maintain the son or from the fact that the son has a limited right of inheritance to the putative father. It might perhaps be put on the ground that amongst Sudras an illegitimate son by a regularly kept concubine is regarded for all purposes as a member of the family though of a somewhat inferior grade to an ordinary son. Where however, the association between the father and mother lasted only for four years and then completely broken the position will be different and the father has no right of guardianship either from the liability to maintain or from the heritable relationship or from the constitution of the family.

B. Sitarama Rao and *V. Rajagopala Mudaliar* for Appellant.

K. Gopalaswami and *G. Venkataraman* for Respondent.

K.S.

Happell, J. Anjaneyulu *v.* Virayya.
6th September, 1946. C. R. P. No. 945 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 33, *rule* 1—*Court if can direct a plaintiff allowed to sue as pauper to pay part of the court-fee.*

The Court has no jurisdiction, while allowing a plaintiff to sue as a pauper, at the same time to direct him to pay part of the court-fee out of the total court-fee payable. Under explanation (i) (*a*) to rule 1 of Order 33 of the Code of Civil Procedure a person is a pauper when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in the suit and if, because he is a pauper, the Court allows the applicant to sue as a pauper the consequence is that he is allowed to sue without paying court-fee. There is no provision in Order 33, which enables the Court to direct that a pauper shall pay part of the court-fee.

K. Kameswara Rao and *N. Rammohana Rao* for Petitioner.

V. Suryanarayana for Respondent.

K.S.

Yahya Ali, J. Meenakshi Ammal *v.* Chidambaram Chettiar.
6th September, 1946. A. A. O. No. 333 of 1945.

Execution—Executing Court when can go behind decree and refuse execution—Inalienable property—Execution against—Stay of.

The principle is undoubtedly well-settled that an executing Court cannot go behind the decree and pass an order in execution which will have the effect of nullifying the decree. To this general principle two well known exceptions have been engrafted, namely, that the executing Court will stay its hands where it is plain on the face of the record that the alienation is prohibited by statute or that it is opposed to public policy. Accordingly where on the face of the record it does appear that the properties are unenfranchised temple service inam lands and as such inalienable and that its sale will be opposed to public policy, the executing Court is entitled to stay its hands and refuse to direct the sale of those properties in execution.

V. Ramaswami Aiyar for Appellant.

M. Sundaram for Respondent.

K.S.

Bell, J. — Dhanalakshmi Ammal *v.* Lakshmana Chetty.
28th August, 1946. — C. R. P. Nos. 1530 of 1945 and 134 of 1946.

Civil Procedure Code (V of 1908), *Order* 39, *rule* 1—*Suit against a Hindu widow by reversioner for accounts of properties coming into her hands on her husband's death—Amount standing to widow's credit in Court deposit—Injunction against widow applying for it—If can be ordered.*

A decree for partition was passed in favour of a Hindu widow against *L* her husband's brother who was ordered to pay her a sum of nearly Rs. 6,000 in respect of mesne profits. This money was not paid but as a result of execution proceedings the sum due together with interest and costs was eventually deposited into Court. *L* then filed a suit in which he claimed as representing himself and the reversioners an account of the properties which had come into the hands of the widow on her husband's death. He alleged that she had wasted the assets. He filed a petition under Order 39, rule 1 and section 151, Civil Procedure Code, praying that the amount in Court deposit to the credit of the widow should not be paid to the widow and that she should be restrained by an injunction from applying for it, or alternatively it should be paid out to her only upon her furnishing security.

Held, the amount standing to the credit of the widow cannot be said to be property in dispute in the suit for accounts and the reversioner was not entitled to any injunction in respect of that amount.

Teja Singh v. *Rani Harnam Kaur,* A.I.R. 1925 Lah. 628, referred to.

V. T. Rangaswami Aiyangar for Petitioner.

R. Ramamoorthy Aiyar for Respondent.

K.S.

Yahya Ali, J. — Satyanarayana Reddi, *In re.*
4th September, 1946. — Crl. M. P. No. 998 of 1946.

Criminal Procedure Code (V of 1898), *section* 227—" *Add to* "—*Meaning—Power to add new charge.*

The Court may add a new charge at any time before judgment is pronounced provided that the safeguards mentioned in section 227 of the Criminal Procedure Code were duly observed. In section 227 in the words " add to," the concept of a new charge is implicit.

Emperor v. *Chinna Kaliappa Goundan,* (1905) 16 M.L.J. 79 : I.L.R. 29 Mad. 126 (F.B.) and In re *Ponnuswami Goundan,* (1931) 62 M.L.J. 469 : I.L.R. 55 Mad. 622 (F.B.), relied on.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. — Tayub Mahomed Hajee Moosa & Co. *v.* The Governor-General in Council.
5th September, 1946. — S. A. No. 814 of 1945.

Railways Act (IX of 1890), *sections* 72 (2) *and* 75—*Scope—Consignor asked to pay higher rates not prepared to pay such rates and executing risk notes absolving company from any liability—Goods lost by misfeasance of railway servants in carriage by railway—Company, if absolved from liability.*

When the consignor was not prepared to pay the higher charges and undertook to absolve the railway company from loss of any kind whatever, it will not lie in his mouth to say that merely because they carried the articles and the loss was caused by misfeasance on the part of the railway servants, the railway company is not absolved from liability for any loss.

D. Narasaraju and *V. Ramaswami* for Appellant.

C. Krishnaswami Aiyar instructed by *Messrs. King and Partridge* for Respondent.

K.S.

Rajamannar, J. Bangaru Reddy *v.* Mangammal.
13th *September*, 1946. S. A. No. 1258 of 1945.

Hindu Widows Re-marriage Act (*XV of* 1856), *section* 2—*Property given to widow in full settlement of her claim for maintenance—If liable to divestiture on re-marriage.*

In full settlement of a widow's claim for her maintenance her deceased husband's brother *X* gave her two items of property absolutely. Subsequently the widow re-married. *X* trespassed on an item of the property given by him to the widow who thereupon sued for possession. *X* pleaded that by re-marriage the widow had incurred a forfeiture.

Held, that as the gift of the properties was in full settlement of the claim for maintenance it become the property of the widow and re-marriage cannot divest her.

Arunachalam Chetty v. *Seshiah Chetty*, (1938) 2 M.L.J. 701, followed.

Subramanyam and Rajagopal for Appellant.

T. E. Ramabhadrachariar for Respondent.

K.S.

Wadsworth, O.C.J. and Rajamannar, J. Soorappa Shetty Kolkebai *v.* Province of Madras.
18th *September*, 1946. C. M. P. Nos. 4289 and 4290 of 1946.

Writ of certiorari—*Government of Madras* (*food department*) *constituting local committees for procurement and distribution of food—Nature of powers—Cancellation of election to the committee—Order if can be quashed by Court by the issue of a writ of* certiorari *at the instance of a person elected.*

The village taluk and district committees which the Government of Madras (by its Food department) decided to constitute by the method of election for the procurement and distribution of food are purely advisory committees intended to assist with local help and advise the executive officers responsible for the administration of the food regulations in each district, taluk or village. The Government were under no statutory obligation to constitute such committees and its decision to constitute them was a purely executive order.

Having by such an order decided to constitute such committees chosen by election the Government had the power to abolish those committees forthwith and if instead of abolishing the committees they decided to reconstitute them by fresh elections on a different basis the Government acted within its legal powers and it certainly did not act under any quasi judicial powers in respect of which it is governed by rules or regulations which the Court can enforce. Accordingly a writ of *certiorari* cannot be sought by a member of the committee first elected questioning the Government for the cancellation of the election and holding fresh elections.

V. Ramaswami Aiyar for *Messrs. Row and Reddy* for Petitioner.

K.S.

Yahya Ali, J. Abraham, *In re.*
18th *September*, 1946. Cr. R. C. No. 974 of 1946.
(Case Referred No. 34 of 1946).

Criminal Procedure Code (*V of* 1898), *section* 531—*Conviction and trial in wrong local area cannot be set aside as made without jurisdiction unless it has occasioned a failure of justice.*

The accused was charged with having been found in a drunken state and that he was behaving in a riotous disorderly manner. He pleaded guilty and was sentenced to a fine of Rs. 5 on conviction under section 3 (12) of the Town Nuisance Act by a Bench Court which assumed it had jurisdiction over the area where the occurrence took place. Subsequently it was found on enquiry that the Court had no jurisdiction over that area. On a reference,

Held, section 531 of the Criminal Procedure Code applied, and as the trial in the wrong local area had not occasioned a failure of justice the conviction need not be set aside.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Govindarajachari, J. Picha Moopanar *v.* Velu Pillai.
6th September, 1946. S. A. No. 1023 of 1945.

Transfer of Property Act (IV of 1882), *section* 53—*Partition in Hindu joint family allotting smaller share to the father with intent to defeat creditors—Right of creditors to ignore such partition and proceed in execution against proper share which ought to have been allotted.*

If a partition between a Hindu father and his sons is unequal and the father is allotted a smaller share than would be his due with intent to defeat the creditors, the latter can avoid the partition under section 53 of the Transfer of Property Act and proceed against what would be the father's proper share in the family properties in execution of the decree against him ignoring the allotment of the properties at the partition.

K. S. RM. Firm v. *Subbiah,* I.L.R. (1945) Mad. 138, relied on.

The fact that the debts of the father are mentioned in the partition deed and the sons are directed to discharge respective shares of the debt cannot affect the creditors and render the partition deed not fraudulent. The creditors not being parties to the contract embodied in the partition deed cannot take advantage of it and enforce the arrangement against the sons.

T. L. Venkatarama Aiyar for Appellant.

K. Venkateswaran for Respondent.

K.S.

Wadsworth, O.C.J. and Rajamannar, J. Balakrishnan Pillai *v.* Chinnathayi Ammal.
6th September, 1946. L. P. A. No. 60 of 1946.

Landlord and tenant—Tenant leaving house in possession of his licensee and going to live elsewhere—If terminates tenancy—Possession of such licensee to be deemed to be that of lessor.

A house in Madras was brought to sale in execution of a decree against the original owner and it was purchased in August 1918 by *G* and his brothers, the sons of the decree-holder who had died. On 25th September, 1919 *G* and his brothers sold the property to *D* and on the same date *G* executed a rental agreement in favour of *D* on the basis of a monthly tenancy. *G* paid the rent for a few months. Subsequently he left Madras and went to live in Bangalore and his brothers also went to live elsewhere. *C,* sister-in-law of *G,* continued to reside in the house. There was no evidence whether she paid rent to *D* or not. But she paid the Municipal taxes claiming to be the owner in her dealings with the Corporation.

In 1933, *D* sold the house to *M,* the sale deed expressly not warranting title. In 1934 *M* filed a suit in which he sought to eject *C* as a tenant on the termination of the tenancy. The written statement asserted that *G* was the owner who was in possession through *C.* The suit was dismissed by the Small Cause Court on the ground that there was no proof of any letting by *M* to the defendants or of any attornment by them. A suit brought in 1943 by *M* in the City Civil Court to evict *C* from the house, was decreed by that Court. But in appeal Somayya, J., held that *M's* title was good but that he had not proved possession within twelve years before suit and dismissed the suit. On Letters Patent Appeal,

Held, G was admittedly a monthly tenant of *D* on a monthly tenancy and the tenancy was not terminated in any way known to law. The fact that *G* left

Madras and went to live in Bangalore would not justify any inference that there was any relinquishment or abandonment of the tenancy. The mere fact that there was an assertion in 1934 of hostile title in *G* would not have the effect of putting an end to the tenancy, at any rate, at any earlier date. The possession of *G* and his licensee *C* continued to be the possession of the lessor and the purchaser from him. Accordingly *M* must be deemed to have been in possession within twelve years of the suit and will be entitled to recover the property.

T. R. Sundaram for Appellant.

K. N. Subrahmanyam for Respondent.

K.S.

Chandrasekhara Aiyar, J. 12*th September*, 1946.

Mushtoorappa *v.* Hanumanthappa. S. A. Nos. 782 to 785 of 1945.

Practice—Appeal—Suit for damages for malicious prosecution—Concurrent findings that there was malice or absence of reasonable and probable cause—Findings of fact which cannot be gone into in second appeal.

In a suit for damages for malicious prosecution, a concurrent finding of the trial Court and first appellate Court that the prosecution of the plaintiff was actuated by malice and was without reasonable and probable cause is a finding of fact which cannot be gone into in second appeal. I.L.R. 36 Mad. 375 and 10 L.W. 314, followed; I.L.R. 25 Bom. 332 (P.C.), relied on; 12 C.L.J. 410 and A.I.R. 1939 Mad. 789, dissented from.

Ch. Raghava Rao for Appellants.

K. Seshagiri Rao for Respondents.

K.S.

Horwill, J. 13*th September*, 1946.

Bapayya *v.* Veerayya. A. A. A. O. No. 219 of 1946. (C. R. P. No. 1408 of 1945 converted into C. M. S. A.)

Practice—Order amending decree—Appealability.

Civil Procedure Code (*V of* 1908), *section* 47—*Order amending decree—Court purporting to decide appeal under section* 47, *Civil Procedure Code—Second appeal.*

An order amending a decree is an appealable order and the appellant is not deprived of his remedy by way of appeal against the order merely because he had another and later remedy (by way of appeal against the amended decree) when in pursuance of the order appealed against the decree was amended. If the appeal against the order of amending the decree is allowed, it will have the effect of setting aside all subsequent orders.

A second appeal would lie to the High Court where the lower Court purported to entertain an appeal under section 47, Civil Procedure Code, though the matter decided was not one connected with the discharge or satisfaction of the decree, for instance, an order amending a decree.

K. Krishnamoorthi for Appellant.

K. Kotayya for Respondent.

K.S.

Chandrasekhara Aiyar, J.
16th September, 1946.

Viranna *v.* Pallayya,
A. A. O. No. 133 of 1946.

Mortgage—Clause providing for pre-emption in favour of mortgagee if mortgagor were to sell during period of mortgage—Clog on equity of redemption.

A clause in a mortgage was as follows :—" If during the term of this mortgage, if I choose to sell the property, I shall sell it to you for the price already fixed between us, deducting out of it the Rs. 400 (the mortgage amount) now given to me." On a sale by the mortgagor to a third party the mortgagee brought a suit to enforce the clause for pre-emption in the mortgage,

Held, the stipulation for pre-emption is a clog on the equity of redemption and must be relieved against.

Case-law reviewed. I.L.R. 24 Mad. 449, considered not good law.

B. V. Subramanyam for Appellant.

P. Suryanarayana for Respondent.

K.S.

Yahya Ali, J.
19th September, 1946.

Abdul Rahim, *In re.*
Cr. R. C. Nos. 805 and 806 of 1946.
(Cr. R. P. Nos. 773 and 774 of 1946.)

Madras Gaming Act (*III of* 1930), *section* 4 (2)—*Scope—Betting in public street—Offence—Horse which is backed not running—Betting if ceases to be offence.*

If betting takes place anywhere outside the race enclosure whether in a public street or in any other place it is an offence within the meaning of section 4 (2) of the Madras Gaming Act, 1930. It cannot be said that betting in a public street on horse race is not an offence under the Act merely because there is no reference in section 4 (2) to a public street as in section 12. "Gaming" is defined in section 3 of the Act as including betting on a horse race except when such betting takes place in a place within the race enclosure. The fact that a particular horse which was backed did not actually run or was not scheduled to run would make no difference and the betting will still be an offence. The underlying purpose and policy of the Madras Gaming Act is to save the ordinary race going public from the evil effects of betting on horse races, and it would be a negation of the fundamental principle of the Act to hold that betting on horses which did not actually run in the race or on horses which were not scheduled to run on the particular date would not amount to an offence.

M. C. Ragjagopalan jor Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J.
19th September, 1946.

Andalamma *v.* Natesam Pillai.
S. A. No. 1233 of 1945.

Limitation Act (*IX of* 1908), *Article* 120—*Suit by attaching decree-holder to declare that sale of property sought to be attached was sham and nominal—Starting point of limitation.*

A decree-holder who sought to attach certain properties as belonging to his judgment-debtor was met with a claim by the wife of the debtor who claimed the properties under a sale deed of 1928 in her favour. The claim having been allowed

the decree-holder filed a suit for declaration that the alleged sale deed was sham and collusive. On a plea of limitation,

Held, a liberal construction must be placed on the words "when the right to sue accrues" in Article 120 of the Limitation Act. It is not enough if there is merely knowledge of the real nature of a transaction. The transaction challenged must be availed of by some one in infringement or invasion of the plaintiff's rights before it could be said that his right to sue accrued. It is only when the alienee seeks to support his or her title on the basis of such a transaction and puts it forward against a person who proceeds on the footing that the properties continue to be the judgment-debtor's that a cause of action can be said to arise in the creditor's favour. Till then the knowledge obtained is innocuous. The right to apply accrued to the plaintiff when the claim was preferred by the wife on the basis of the sham and collusive sale deed in her favour. [Certificate granted.]

B. V. Ramanarasu for Appellant.

K. Bhimasankaram for Respondent.

K.S.

Yahya Ali, J. Minakshisundaram Ayyar *v.* Rangaswami Ayyar.
7th October, 1946. C. M. P. No. 4031 of 1946.

Practice—Appeal—Person who has appealed against the decree and whose appeal has been dismissed—If can prefer memorandum of cross-objections after such dismissal.

No memorandum of cross-objections can be preferred by a person who has appealed against a decree and whose appeal has been dismissed and he cannot file the objections after such dismissal.

T. V. Ramanatha Ayyar for Petitioner.

R. Partha Rao for *B. Sitarama Rao* for Respondent.

K.S.

Yahya Ali, J. Subba Rao, *In re.*
10th October, 1946. Cr. R. C. No. 569 of 1946.
(Cr. R. P. No. 544 of 1946).

Criminal Trial—Change of magistrates—Right of accused to de novo *trial and to re-examination of all the witnesses—Court cannot refuse to allow examination in chief of the witnesses at the* de novo *trial.*

When there is a change of magistrates, the accused is entitled to a *de novo* trial, and to a re-examination of all the witnesses. Examination of witnesses includes examination-in-chief as well as cross-examination and the Court has no jurisdiction to refuse to allow examination-in-chief of the witnesses at the *de novo* trial.

M. G. Kamath for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Rajamannar, J. Zamindar of Devarakota, Chellapalli *v.* Venkadu.
3rd September, 1946. S.A. Nos. 1783 to 1788 of 1944.

Madras Estates Land Act (I of 1908)—Contract for payment of enhanced rent before passing of the Estates Land Act—If can be presumed merely from long continued payment at higher rate.

It cannot be contended that a Court can presume a contract to pay a higher rate of rent and a legal origin and consideration for it from a long continued payment of the higher rate. It is a question of fact on which a Court should give a finding taking into consideration all the relevant circumstances and evidence on record. 36 M.L.J. 320 : I.L.R. 42 Mad. 475 (F.B.), explained. 62 M.L.J. 511, relied on.

Unless there is a valid contract, that is, an agreement supported by consideration the fact that the tenants have for long periods been paying at a higher rate would not itself entitle the landholder to enforce that rate when objection is made after the passing of the Estates Land Act. 36 M.L.J. 49 : L.R. 45 I.A. 195 : I.L.R. 43 Mad. 174 (P.C.), relied on.

T. V. R. Thathachari for Appellant.
M. Appa Rao for Respondent.

K.S.

Chandrasekhara Aiyar, J. Radhakrishna Murthy *v.* Ethirajulu Chetty & Co.
10th September, 1946. A.A.O. No. 504 of 1945.

Arbitration Act (X of 1940), sections 16, 30 and 39—Objection to award on the ground that damages were given on wrong basis—Decree in terms of award—If appealable as order refusing to remit the award for reconsideration.

Where objection to an award was that the umpire gave damages on the basis of the market rate prevailing on 30th September, having however found that the breach of contract was on the 27th September, it is an objection to the legality of the award. Where the Court passes a decree in accordance with the award it is really a case where the Court refused to remit the award for reconsideration and such an order is not contemplated in section 39 of the Arbitration Act as appealable. In such a case section 16 of the Arbitration Act deos not apply. An award can be set aside only on one or more of the three grounds mentioned in section 30 of the Arbitration Act.

C. Vasudevan for Appellant.
B. Venkataramiah for Respondent.

K.S.

Wadsworth, O.C.J. and Rajamannar, J. Ali Sahib *v.* Zainub Bi Bi.
17th September, 1946. O.S.A. No. 53 of 1945.

Transfer of Property Act (IV of 1882), section 50—Scope—Lessee paying rent to his lessor after knowledge that his lessor had no title—If entitled to claim benefit of section 50, Transfer of Property Act, against claim by real owner for rents or profits—Section if applies to advance of rent.

Where a lessee subsequently became aware that his lessor had no title to the property leased, section 50 of the Transfer of Property Act can have no application. The lessee, no doubt, would be estopped from denying the title of his lessor if he should demand rent. But it was open to such lessee to vacate the premises as soon as he was aware of the defect in the title of his lessor. If he continued to remain in possession and pay rent to a person who, he knew, was not entitled to receive it, he was taking a risk with his eyes open and he can have no protection under section 50 of the Transfer of Property Act. The section further applies only to a payment as rent and not to a payment made as an advance. The advance will have to be regarded as a loan to be appropriated to future rent and not as a payment by way of rent.

T. R. Ramachandran for Appellant.
K. S. Rajagopala Aiyangar and *Muhammad Sayeed* for Respondent.

K.S.

N R G

Horwill, J. Ramaswami Udayar *v.* Karuppan Chettiar.
18th September, 1946. C.R.P. No. 1055 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 33, *rule* 5 (d-1) (*Madras*)—*Scope*—*Application to sue in* forma pauperis—*Power to dismiss on the ground that the suit appeared to be barred by* res judicata—*If bar should be clear on the face of the plaint itself*—*Admissibility of evidence as to* res judicata.

It cannot be said that it was not permissible to dismiss an application to sue in *forma pauperis* under Order 33, rule 5 (*d*-1) of the Code of Civil Procedure unless it was clear on the face of the plaint itself that the suit was barred. Sub-rule (*d*-1) (Madras) requires a Court to dismiss an application where the suit appears to be barred by any law. It does not contain any reference to the plaint as sub-rule (*d*) does by implication in its reference to "allegations." Moreover rule 6 of Order 33 expressly makes provision for the adducing of evidence to prove that the application is not subject to any of the prohibitions in rule 5. In every case however the Court has to consider to what extent it will record evidence in order to determine the question arising under Order 33, rule 5. Though an elaborate enquiry is not contemplated, the Court need not confine itself to the bare allegations in the plaint if it can be readily proved by the examination of a few documents that the suit appeared to be barred by any law.

[Difficulties which an elaborate enquiry would lead to indicated.]

An order dismissing an application to sue in *forma pauperis* under Order 33, rule 5 (*d*-1) of the Code of Civil Procedure on the ground that it appeared to be barred by *res judicata* according to certain documents admitted in evidence cannot be said to be erroneous and interfered with in revision.

R. Desikan for Petitioner.

D. Ramaswami Aiyangar, *P.S. Srinivasa Desikan* and *N.S. Raghavan* for Respondents.

K.S.

Chandrasekhara Aiyar, J. Karunayanatha Nadar *v.* Sellam Kuppa Raju.
20th September, 1946. S.A. No. 464 of 1945.

Injunction—*Encroachment by building by defendant*—*Delay in applying for mandatory injunction*—*Effect*—*Relief which plaintiff can be granted.*

Where though the construction of a building on the encroached site belonging to the plaintiffs was started in February, 1940 and completed in July, 1941, the plaintiffs sued only in July, 1942, for a mandatory injunction,

Held, that the plaintiffs were guilty of delay in filing the suit and this disentitled them to the mandatory injunction claimed. They were, however, entitled to damages which will be the value of the site encroached upon.

K. K. Sridharan for Appellant.

T. P. Gopalakrishna Aiyar for Respondent.

K.S.

Shahabuddin, J. Venkatapaiya *v.* Venkateswara Rao.
11th October, 1946. C.R.P. No. 1125 of 1945.

Contract—*Suit for amount due under alleged agreement for services rendered*—*Agreement not proved*—*Decree on basis of* quantum meruit—*If can be passed in the absence of specific plea in the plaint.*

Where an alleged agreement under which the plaintiff claims a sum as remuneration for services rendered is found against, the Court should not pass a decree for any amount as reasonable remuneration in the absence of a specific plea of *quantum meruit* in the plaint. The Court having found that the alleged agreement had not been proved should dismiss the suit. 37 L.W. 313, followed.

N. V. B. Shankara Rao for Petitioner.

A. Raghaviah for Respondent.

K.S.

Chandrasekhara Aiyar, J. Nannu Sahib *v.* Mahammed Salia Sahib.
7th October, 1946. A. A. O. No. 126 of 1945.

Decree—Compromise decree in partition suits—Preliminary decree followed by final decree—If necessary for execution.

Even in the case of decrees passed by Courts in partition suits on the basis of a trial on the merits, there is no obligation to have two decrees, one preliminary and one final though as a general rule such decrees are made for the sake of convenience, the first declaring the rights of parties and providing for the appointment of a commissioner for division of the properties and the second actually dividing the properties by metes and bounds. In the case of compromise decrees, however, it is open to the parties to provide straightaway for the execution of the decree that they want the Court to pass, without any need for a further decree. Such a compromise decree can be executed without a final decree. In any event where in an earlier execution petition it has been decided that execution could commence even without a final decree the parties will be barred by *res judicata* from raising such contention in a subsequent petition for execution.

T. K. Subramania Pillai and *M. Annamalai* for Appellant.

A. V. Narayanaswami Aiyar for Respondent.

K.S.

Lakshmana Rao, J. Murugappa Naicker *v.* Natesa Naicker.
9th October, 1946. S. A. No. 93 of 1946.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 63*—Applicability—Claim in respect of mortgage—Order "without determining validity or otherwise of mortgage, the property will be sold notifying the mortgage in the sale proclamation"—If amounts to refusal of claim —If suit should be filed within one year.*

An order in a claim petition of *A* in respect of a mortgage was made on 19th January, 1938, as follows:—"Without determining the validity or otherwise of the mortgage the property will be sold notifying the mortgage in the sale proclamation." No suit was filed to establish the right claimed and the property was sold on 12th October, 1938, subject to another mortgage. The sale was confirmed on 26th June, 1939, and *X* was the purchaser. *A* then started proceedings against the mortgagor under the Madras Debt Conciliation Act in 1939 and obtained a consent order on 6th March, 1940. *A* purchased the property in execution of that order on 2nd September, 1942, and filed a suit on 14th June, 1943, for recovery of the property from *X*.

Held, *A's* claim petition was under rule 58 of Order 21, Civil Procedure Code, for release of the properties from attachment and the order made on it will amount to a refusal of the claim and the order falls under rule 63 of Order 21. No suit having been filed within one year of the order to establish the right claimed, the suit against *X* in 1943 will be barred by reason of Order 21, rule 63 of the Civil Procedure Code.

Cannanore Bank, Ltd. v. *Madhavi*, (1941) 2 M.L.J. 956 : I.L.R. (1942) Mad. 336 (345) (F.B.), relied on.

N. Sivaramakrishna Aiyar and *V. N. Shama Rao* for Appellant.

M. R. Narayanaswami for Respondent.

K.S.

Chandrasekhara Aiyar, J. Namasivayam Pillai *v.* The Travancore National and Quilon Bank, Ltd.
10th October, 1946. A. A. O. No. 532 of 1945 and A. A. A. O. No. 239 of 1945.

Execution—Lands subject to assessment of Rs. 44 *valued at Rs.* 100 *in sale proclamation—Judgment-debtor having notice of such valuation and asking for adjournments*

waiving fresh proclamations—If can ask that sale held in pursuance of proclamation should be set aside on the ground of gross under-estimate.

Where lands bearing an assessment of Rs. 44 was valued originally at Rs. 400 and later at Rs. 100 has been sold, the judgment-debtor who has had notice and actually waived fresh proclamations when obtaining adjournments of the sale cannot subsequently come forward and claim that the sale should be set aside on the ground of gross under-valuation.

Saadatmand Khan v. *Phul Kuar*, (1898) L.R. 25 I.A. 146 : I.L.R. 20 All. 412 (P.C.), distinguished.

P. N. Appuswami Aiyar for Appellant.

King and Partridge and *T. R. Ramachandran* for Respondents.

K.S.

Wadsworth, O.C.J. and Yahya Ali, J.
11th October, 1946.

Nagayya *v.* Balakotayya.
C. M. P. No. 110 of 1946.

Civil Procedure Code (V of 1908), sections 109 and 110 and Order 45—Decision relating to a right to manage trust properties—Value of the subject-matter for purposes of leave to appeal to the Privy Council—If to be taken as market value of the properties concerned or some notional value.

It would be entirely wrong to value a right to manage trust properties as if it had any relation to the market value of those properties. If the right of management carries with it any emoluments of pecuniary value, the capitalised value of those emoluments would presumably be the value of the office. If there are no emoluments the office can have only such notional value as attaches to the prestige which the holding of the office conveys. In respect of an office having no emoluments where the suit has been valued at Rs. 6,000 by the plaintiff the value of the subject-matter of the suit and appeal thereon is below Rs. 10,000 and so leave to appeal to His Majesty in Council must be refused.

K. Subba Rao and *P. Rami Reddi* for Petitioner.

Ch. Raghava Rao for Respondents.

K.S.

Yahya Ali, J.
18th October, 1946.

Pichi Naidu *v.* Chenchukrishnareddi.
Cr. R. C. No. 854 of 1946.
(Cr. R. P. No. 821 of 1946).

Criminal Procedure Code (V of 1898), section 145 (1) and (6)—Order under section 145 (6)—Cannot be passed unless a preliminary order under section 145 (1) has been passed.

The Magistrate has no jurisdiction to pass an order under section 145 (6) of the Code of Criminal Procedure unless a preliminary order under section 145 (1) has been passed. It cannot be said that there is no prejudice caused to the other party by reason of the omission to pass such preliminary order. The preliminary order if passed would have disclosed the grounds on which the Magistrate was satisfied as required in section 145 (1). Though the conduct of the party (against whom the order is made) in allowing the Magistrate to go on without objection may be reprehensible, it cannot validate an order which is without jurisdiction.

Mariasusai Udayan v. *Hajee Mahamud Azeezuddin Sahib*, (1936) 71 M.L.J. 305, followed.

A. Bhujanga Rao for Petitioner.

T. V. Ramanatha Aiyar for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J. Hanumantha Rao *v.* The Andhra Bank, Ltd., Bandar.
8th October, 1946. A. A. O. No. 385 of 1945.

Provincial Insolvency Act (*V of* 1920), *sections* 4, 47 *and* 54-A—*Application under sections* 4 *and* 47—*If can be treated in appeal as one under section* 54-A.

Substantial rights of the parties cannot be allowed to be defeated by technicalities, if those can be brushed aside or overcome. The mere fact that an application was filed under sections 4 and 47 of the Provincial Insolvency Act will not take away the right of the applicant to have it treated in appeal as an application under section 54-A if that is the proper section applicable.

V. Subramanyam for Appellant.

P. Satyanarayana Rao and *G. Balaparameswara Rao* for Respondent.

K.S.

Wadsworth, O.C.J., and *Yahya Ali, J.*, Lakshmanan Chettiar *v.* Thangam.
11th October, 1946. C. M. P. No. 3309 of 1946.

Civil Procedure Code (*V of* 1908), *section* 110—*Value of subject matter in appeal to Privy Council—Computation—Decree of affirmance with a slight variation as to certain debts in a partition decree—Leave to appeal to Privy Council—When granted.*

The value of the subject-matter in dispute in an appeal to the Privy Council in a partition suit must be taken to be the value of the share in the joint family property in respect of which the appellant is claiming. (1944) 2 M.L.J. 218 (P.C.) referred to.

When there is a slight variation of the decree which is wholly in favour of the proposed appellant and about which he has no grievance and in regard to other matters the appellate decree has affirmed the decree of the trial Court, the appellate decree is in the main one of affirmance within the meaning of section 110 of the Civil Procedure Code and the appellant cannot have because of the modification, a right of appeal on other points on which the Courts have concurred without showing that there is a substantial question of law involved. (Case-law discussed).

If the subject-matter of the dispute in appeal had been the amount of the decree or the amount of damages, a variation whether to the prejudice or in favour of the petitioner would not alter the decree of variance into one of affirmation. But where the question in dispute is on a totally different point such as the question of debts due by the family in a partition suit in regard to which the applicant has succeeded and succeeded altogether so that he has no further grievance in the matter, he cannot without showing a substantial question of law have a right to litigate upon other points upon which the Courts have been in agreement.

V. Ramaswami Aiyar for Petitioners.

K. V. Ramachandra Aiyar for *V. Meenakshisundaram* for 1st Respondent.

O. K. Ramalingam for 2nd and 3rd Respondents.

R. M. Halasyam for 4th Respondent.

K.S.

Rajamannar, J. Ramiah Thevar *v.* Thambu Thevar.
11th October, 1946. A. A. A. O. No. 283 of 1945.

Civil Procedure Code (*V of* 1908), *section* 47 *and Order* 21, *rules* 58 and 60—*Objection by judgment-debtor to attachment on the ground that the property attached was trust property—Order rejecting—If falls under section* 47 *or under Order* 21, *rule* 58.

If the objection to an attachment is made by the judgment-debtor or his representative not on his own behalf, but on account of a third party as trustee, or as shebait of an idol, or on the ground that the property is wakf, the objection is under Order 21, rule 58 and not under section 47 of the Civil Procedure Code and the order rejecting such objection is not appealable. (Case-law discussed). Leave to appeal granted.

K. S. Ramabhadra Aiyar for Appellant.

K. S. Champakesa Aiyangar and *K. C. Srinivasan*, for Respondents.

K.S.

N R C

Chandrasekhara Aiyar, J. Rama Rao *v.* Venkata Ratnamma.
14th October, 1946. S. A. No. 1245 of 1945.

Hindu Law—Maintenance—Claim against father for maintenance—Arrears of maintenance—Circumstances in which can be awarded.

While it is true that no demand is necessary to justify a claim for arrears of maintenance and that it is equally unnecessary to show that any debts were incurred by the person claiming maintenance for the purpose of maintaining himself or herself, it is equally undeniable that all the circumstances of the case have to be taken into account to see if there should be an award for arrears and at what rate. Where the next friend of minor children (claiming maintenance from their father), their great grand-mother, was bringing them up in her own house out of natural love and affection and it was nowhere said that she intended to get maintenance for her great grand-children from their father and she made no claim for maintenance prior to the suit, any award of arrears of maintenance would only mean reimbursement of the next friend. In reality it would not be a decree for the maintenance of the minors. Arrears should not be awarded in such a case.

Leave refused.

B. Jagannadha Das and *C. V. Dikshitalu* for Appellant.

P. Satyanarayana Rao for Respondents.

K.S.

Yahya Ali, J. Krishnan, *In re.*
28th October, 1946. Cr. R. C. No. 939 of 1946.
(Cr. R. P. No. 905 of 1946).

Prevention of Cruelty to Animals Act (XI of 1890)*—Animal said to have been treated in a cruel manner—If can be ordered to be confiscated—Criminal Procedure Code (V of* 1898), *section* 517*—If applicable.*

There is no provision in the Prevention of Cruelty to Animals Act, empowering the Court to make an order confiscating the animal which was said to have been treated in a cruel manner by the accused. Where the animal concerned is worth Rs. 400 it should not be confiscated under section 517 of the Criminal Procedure Code in an ordinary case. The sentence of fine awarded and the deprivation of possession of the animal during its detention in an infirmary are sufficient punishment in the circumstances.

S. Ramachandran for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Yahya Ali, J. Rangaswami, *In re.*
31st October, 1946. Cr. R. C. No. 1155 of 1946.
(Taken up No. 6 of 1946).

Madras Suppression of Immoral Traffic Act (V of 1930), *section* 12 (1) *and Madras Borstal Schools Act (V of* 1926), *section* 8*—Person convicted under section* 12 (1) *of Suppression of Immoral Traffic Act—When can be ordered to be detained in Borstal School.*

The mere fact that a person convicted under section 12 (1) of the Madras Suppression of Immoral Traffic Act was a "confirmed pimp and had been living in the society of bad characters" is hardly sufficient to fulfil the requirements of section 8 of the Borstal Schools Act and does not justify his being sent to a Borstal school. The proper course is to award the accused the sentence of two months rigorous imprisonment prescribed under section 12 (1) of the Suppression of Immoral Traffic Act.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K. V. Rajagopalan for Accused.

K.S.

Rajamannar, J. Venkata Sastri *v.* Jagannatha Row.
16th October, 1946. S. A. No. 207 of 1945.

Madras Hereditary Village Offices Act (*III of* 1895), *sections* 3, 10 (2) *and* (3), 11 (2) *and* (3) *and* 12—*Claim to office of village karnam—Jurisdiction of Revenue Courts—Decision of Revenue Courts—If can be challenged by suit in Civil Court.*

X, the karnam of a village, was dismissed from service in 1881 for neglect of duty and a stranger was appointed in his place when Regulation VI of 1831 was in force. Claims were made by the brother and the son of *X* unsuccessfully for the said office in the Revenue Courts which held that they may renew their claims after the death of *X*. *X* died in 1919. *J*, a member of *X*'s family, sued as his heir for the recovery of the office in the Revenue Court in 1938, within three years after his attaining majority. The Revenue Court held that the vacancy occurred only on the death of *X* in 1919 and not on his dismissal in 1881 and decreed the suit against the appellant who unsuccessfully appealed to the District Collector and the Board of Revenue.

The appellant then sued in the Civil Court for a declaration that the decision of the Revenue Courts was *ultra vires* and void for want of jurisdiction.

Held : (*i*) The Revenue Courts had jurisdiction as the subject-matter of the claim was one of the village offices specified in section 3 of the Madras Hereditary Village Offices Act; the ground on which the suit was based being that the plaintiff was entitled to relief under sub-section (2) or (3) of section 10, or sub-section (2) or (3) of section 11, or section 12 of the Act.

(*ii*) It is within the province of the Revenue Courts to enquire into the question of the existence of the vacancy which is the foundation of the plaintiff's case and not the foundation of the jurisdiction of the Revenue Courts.

(*iii*) Accordingly the Revenue Court's decision cannot be challenged in the Civil Court.

21 Q.B.D. 313, applied.

P. Somasundaram for Appellant.

M. S. Ramachandra Rao for first Respondent.

The Government Pleader (*K. Kuttikrishna Menon*) for second Respondent.

K.S.

Bell, J. Watson *v.* The Governor-General in Council represented
17th October, 1946. by the Military Estates Officer, Madras Circle, Wellington.
C.R.P. No. 376 of 1946.

Civil Procedure Code (*V of* 1908), *section* 115—*Revision—Decision as to court-fee—When open to revision.*

A revision petition lies where a plaintiff has been held to have inadequately stamped his plaint. A defendant however who has unsuccessfully challenged the adequacy of court-fee paid by the plaintiff cannot come up in revision unless a further question of jurisdiction is involved.

K. R. Krishnaswami Aiyar and *V. Srinivasan* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Crown.

K.S.

Chandrasekhara Aiyar, J. Muhammad Usman Sahib *v.* Examiner of Local
18th October, 1946. Fund Accounts, Madras.
A.A.A.O. Nos. 234 to 236 and 357 to 365 of 1945.

Madras Local Boards Act (*XIV of* 1920)—*Successive presidents of Panchayat Board—Liability to surcharge in respect of loss caused to the Board by their negligence in not collecting arrears of kist—Test of liability for loss.*

Where three successive presidents of a Panchayat Board are surcharged for loss caused to the Board by their negligence in not collecting the arrears of kist in respect of leases of weekly market, slaughter-houses, and bus stand, it cannot be contended that the earliest of the three presidents was not liable as the right to recover the arrears had not become barred during his regime of office and it was open to the succeeding presidents to recover the amounts by the institution of suits if necessary. Allowing much arrears to accumulate in the hope that they may be collected later, and when taxed with their non-collection to say that his successors were really liable, is to ignore the truth that the loss is attributable to all the three presidents. The fact that the others might also be made liable is no ground for holding that the earlier president was not directly responsible for the loss.

Observations of Lord Sumner in *Weld-Blundell* v. *Stephens*, 1920 A.C. 956 at 986 and Halsbury's Laws of England, Vol. 23, page 591 based on the theory of *novis actus interveniens* distinguished.

M. S. Venkataramier and *B. Pocker* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for the Crown.

K.S.

Bell, J. Kallianna Goundar *v.* Balasubramaniam.

25th October, 1946. C.R.P. No. 112 of 1946.

Court-Fees Act (*VII of* 1870), *section* 7 (v)—*Applicability—Suit by Hindu sons for* (a) *a declaration that sale deed by their father for himself and as guardian of the sons was not binding on them* (b) *for partition and* (c) *for recovery of properties—If one for possession.*

A suit by a Hindu mother as next friend of her sons for (*a*) a declaration that a sale deed executed by their father for himself and as guradian of the sons was not binding on them, not having been executed for family necessities (*b*) for partition and (*c*) for recovery of the properties, is in effect, one for possession to which section 7 (*v*) of the Court-Fees Act applies and court-fee should be levied accordingly.

Ramaswami v. *Rangachariar*, I.L.R. 1940 Mad. 259 : 1940 1 M.L.J. 32 (F.B.) applied.

R. Desikan for petitioner.

A. Srirangachariar for Respondent.

K.S.

Yahya Ali, J. Vellai Mudali, *In re.*

1st November, 1946. Cr. R. C. No. 952 of 1946.

(Taken up No. 4 of 1946).

Penal Code (*XLV of* 1860), *section* 496—*Waylaying and tying* tali *round neck of girl—When amounts to offence under the section.*

The case against the accused was that when the girl was returning from her father's house with a head load of fuel the accused seized her, pushed her down and tied a *tali* round her neck and then let her go. He had intended to marry the gril but was rejected and she was about to be married to somebody else. The accused committed the act apparently to spite the girl and her parents. On a charge of committing an offence under section 496 of the Penal Code,

Held, the act of the accused in tying the *tali* round the neck of the girl in the circumstances did not amount to "going through the ceremony of being married knowing that he is not thereby lawfully married" within the meaning of section 496 of the Penal Code. The accused must be presumed to have known that according to the custom of his community the act did not constitute a ceremony of being married.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

Bell, J. Lingayya *v.* Adilakshmamma.
15*th October*, 1946. C. R. P. No. 792 of 1945.

Provincial Insolvency Act (V *of* 1920), *section* 35—*Annulment of adjudication—Petition for adjudication alleging as acts of bankruptcy* (1) *a mortgage,* (2) *a sale and* (3) *a lease—Application by receiver under sections* 53 *and* 54 *to set aside the mortgage and sale unsuccessful—Lease terminating by efflux of time—Effect—Annulment of adjudication—If can be resisted.*

Where on a petition for adjudication alleging (*a*) a mortgage, (*b*) a sale and (*c*) a lease as acts of bankruptcy, the debtor was adjudicated insolvent and then the application by the receiver under sections 53 and 54 of the Provincial Insolvency Act to set aside the mortgage and sale proved unsuccessful, the adjudication has to be annulled. Though the validity of the lease had not been questioned (the lease having terminated by efflux of time) the lease cannot be relied on as an act of insolvency to resist the annulment of adjudication. It would seem strange that because the Official Receiver or the creditors did not choose to attack one out of several transactions, having failed on the rest, that transaction should be held up, for ever perhaps, to prevent an annulment of adjudication which should otherwise automatically follow the dismissal of the applications in respect of the other transactions.

(1940) 1 M.L.J. 228 : I.L.R. 1940 Mad. 441, referred to.

K. Kameswara Rao and *N. Rammohan Rao* for Petitioner.

K. Kottayya for Respondent.

K.S.

Horwill and Kuppuswami Ayyar, JJ. Ramaswami Pattar *v.* Subramania Ayyar.
28*th October*, 1946. App. No. 259 of 1945.

Transfer of Property Act (*IV of* 1882), *section* 55 (4) (*b*)—*Vendor's lien—If extends to money directed to be paid by the vendee to third parties.*

The wording of section 55 (4) (*b*) of the Transfer of Property Act makes no distinction between consideration due to the vendor himself and sums of money directed to be paid to others. There can be no doubt that the vendor's lien does extend to sums of money directed to be paid by the vendee to third parties as well as to money directed to be paid to the vendor himself.

31 M.L.J. 530 : I.L.R. 39 Mad. 997 (F.B.) relied on.

N. A. Krishna Ayyar and *S. R. Subramanyam* for Appellant.

N. R. Sesha Ayyar and *C. Ravunni Nair* for Respondents.

K.S.

Yahya Ali, J. Alagathorai Padayachi, *In re.*
1*st November*, 1946. Cr. R. C. No. 1033 of 1946.
(Cr. R. P. No. 988 of 1946).

Arms Act (XI *of* 1878), *sections* 14, 16 *and* 19 (i)—*Gist of offence under—Person applying for renewal of license before expiry of his license and getting the new license sometime after expiry of old license—Failure to deposit gun in the interval—Offence.*

The period of one month's grace under the Arms Act for renewal of license, is not intended to extend the period of the license or, in any manner, to limit the scope of section 14 or section 16 of the Arms Act. The weapon which is not covered by the license has to be deposited as soon as the license expires though the person possessing it had applied for a renewal of his license before the expiry of the current license. The period of grace is not a statutory period and it is not open to the holder of the weapon either to claim it as a matter of right or to state that he is not bound to deposit the weapon after the expiry of the period of license. Failure to deposit the weapon amounts technically to an offence under section 19 (*i*) of the Arms Act.

Having regard to the circumstances that the accused had applied in time for the renewal and ultimately got the license and in good faith thought that he was lawfully entitled to keep the weapon for a month, the sentence ought to be nominal and a fine of Rs. 5 and in default a week's simple imprisonment will be sufficient.

N R C

K. C. Subramaniam for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. Mayilvahanam, *In re.*

1st November, 1946. Cr. R. C. No. 279 of 1946.

(Cr. R. P. No. 272 of 1946).

Evidence Act (I of 1872), section 25—Applicability—Transport of rice from British India by sea to Ceylon in contravention of notification under rule 84 (3) of the Defence of India Rules—Prosecution for—Statements made by accused to Assistant Inspector of Customs—If inadmissible as repugnant to the provisions of section 25 of the Evidence Act.

The Assistant Inspector of Sea Customs cannot be deemed to be a police officer within the meaning of section 25 of the Indian Evidence Act. The provisions of section 25 should not be extended to other classes of officers merely on the ground of similarity of function. Statements made by the accused to the Inspector of Sea Customs are not hit at by section 25 of the Evidence Act and will accordingly be admissible in a prosecution for transporting rice from British India to Ceylon in contravention of the notification under rule 84 (3) of the Defence of India Rules.

61 Cal. 607; A.I.R. 1927 Bom. 4 and (1946) 1 M.L.J. 368, distinguished. 1932 M.W.N. (Crl.) 69; 1934 M.W.N. (Crl.) 67 and (1938) 1 M.L.J. 238, relied on.

V. Rajagopalachari and *K. N. Srinivasan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Rajamannar, J. Pulliah *v.* Appanna.

1st November, 1946. A. A. A. O. No. 75 of 1946.

Civil Procedure Code (V of 1908), section 53—Scope—Decree against Hindu father alone in favour of mere endorsee of a promissory note executed by the father—Executability against property in the hands of sons after the death of the father.

In respect of a decree obtained by an endorsee of a promissory note executed by a Hindu father in a suit to which the sons were not parties, after the death of the father the joint family property in the hands of the sons could be proceeded against in execution. The case is covered by section 53, Civil Procedure Code. That section is based upon the theory of pious obligation. The fact that the decree was obtained by an endorsee of a promissory note on the liability arising on the note and not in respect of a liability *de hors* the promissory note does not make the liability of the father to discharge the obligation arising out of the execution of the promissory note any the less a debt within the meaning of section 53, Civil Procedure Code. Property in the hands of the sons would be liable for the payment of the debt due in respect of the promissory note and for the recovery of which a decree had been passed against the father.

K. Kameswara Rao and *N. Rammohan Rao* for Appellant.

N. Bapi Raju for Respondent.

K.S.

Yahya Ali, J. Madhavi Ammal, *In re.*

13th November, 1946. Cr. R. C. No. 1140 of 1946.

(Cr. R. P. No. 1092 of 1946).

Madras Suppression of Immoral Traffic Act (V of 1930)—Girl falling within the operation of the Act—If can be directed to live in a rescue home attached to the Vigilance Association—Madras Probation of Offenders Act (III of 1937)—If applicable.

It is doubtful whether under the Madras Probation of Offenders Act or under the Suppression of Immoral Traffic Act the Court is empowered to make a direction that a girl falling within the operation of the latter Act should live in a rescue home attached to the Vigilance Association. There is no statutory or other authority enabling the Court to make such a direction. The girl can be ordered under section 4 (2) of Madras Probation of Offenders Act to remain under the supervision of the Woman Probation Officer.

T. R. Ramachandran for Petitioner.

M. Santosh for the Crown Prosecutor on behalf of the Crown.

K.S.

Horwill, J. Ramakrishna Ayyar *v.* Bargavi Amma.
24th October, 1946. C. R. P. No. 935 of 1945.

Mortgage with lease back—Construction—Provision that the rent shall be paid from the current year onwards every season before 30th Makaram—For balance of rent and interest the equity of redemption, other properties and lessees liable—Charge created—Extent.

In a rental agreement the particulars of the pattom were set out and the rent payable calculated to be Rs. 28. The deed further provided :—"This sum of Rs. 28 shall be paid from the year 1111 onwards every season before the 30th Makaram and if the arrears of rent are allowed they shall be paid with interest at 12 per cent. per annum" * * * * * "We shall surrender possession at our own expense after the 30th Makaram 1112." "For the balance of rent and interest the equity of redemption over and above the mortgage for Rs. 1,165 our other properties and ourselves are liable and we agree to your taking surrender of the properties." On a construction of the lease,

Held, (1) the rental agreement is one for a period of one year and not for an indefinite period. 51 M.L.J. 378, distinguished.

(2) The charge created for arrears of rent would extend to the whole of the rent due, in the event of the tenants remaining in possession beyond the year of lease and is not restricted to the rent due during the year of lease.

58 Mad. 75 : 67 M.L.J. 445 ; 11 M.L.J. 186 ; 93 I.C. 20 and 16 I.C. 560, distinguished.

C. K. Viswanatha Ayyar for Petitioner.

C. S. Swaminadhan for Respondent.

K.S.

Chandrasekhara Aiyar, J. Venkataramayya *v.* Gangaraju and Son.
31st October, 1946. S. A. No. 1600 of 1945.

Provincial Small Cause Courts Act (IX of 1887), Schedule II, Article 35 (ii)—Applicability—Suit by vendee for recovery of money paid for goods contracted to be sold but not delivered—If excepted suit—Value of suit less than Rs. 500—Second appeal if lies—Civil Procedure Code (V of 1908), section 102.

A failure to fulfil the terms of an obligation under a contract under which the defendant agreed to despatch to the plaintiff who had paid the price agreed, a certain number of baskets of jaggery is different from a dishonest sale of goods by a warehouse-keeper entrusted with goods for safe custody. A suit for the recovery of the value paid for the goods which the defendant had failed to deliver does not fall under Article 35 *(ii)* of the second schedule of the Provincial Small Cause Courts Act and is not excepted under that article. Where the value of such suit is less than Rs. 500 no second appeal lies. I.L.R. 49 All. 85, distinguished.

The fact that the suit was tried on the original side and that an appeal was preferred from the decree of the District Munsiff to the District Judge will not alter the nature or complexion of the suit for the purposes of second appeal.

C. Rama Rao for Appellant.

B. V. Subrahmaniam for Respondent.

K.S.

Yahya Ali, J. Ayya Mooppan *v.* Komali.
7th November, 1946. S. A. No. 1160 of 1945.

Hindu Law—Joint family—Partition—Essentials of—Mere cultivation and enjoyment of defined pieces of land separately by each coparcener—If sufficient to establish partition.

Partition is a new status and when it is brought about by consensus of the members of a coparcenary they must intend that their condition as coparceners shall cease. It is not sufficient that they should alter the mode of holding their property. They must alter, their title to it. They must cease to be joint owners, and become separate owners. The mere fact that brothers forming a family were enjoying defined pieces of land, which they were cultivating separately will not amount to a partition. The mere existence of separate transactions or holding of land in separate portions would not establish a partition unless such steps were taken with a view to carry out a partition.

N R C

Maynes Hindu Law (10th Edition) page 556 and I.L.R. 1942 Mad. 886 : (1941) 2 M.L.J. 58 (P.C.), relied on.

R. Gopalaswami Aiyangar for Appellant.

G. Gopalaswami for Respondent.

K.S.

Horwill and Kuppuswami Ayyar, JJ. Verghese Vaidyar *v.* Rex.
18th November, 1946. Cr. M. P. No. 1736 of 1946.

Criminal Procedure Code (*V of* 1898), *section* 54 (7)—*Scope—Power to arrest without warrant—Conditions necessary for exercise of—If person arrested should also be liable to be arrested without a warrant if offence had been committed in British India.*

Section 54 (7) of the Criminal Procedure Code authorises any police officer to arrest without a warrant any person (1) against whom credible information has been received that he has done an act outside British India which if done within British India would be an offence and (2) who, under any law relating to extradition, etc., is liable to be apprehended or detained in custody in British India. But there is nothing in section 54 of the Criminal Procedure Code which justifies a conclusion that the person arrested should be liable to be arrested without a warrant if the offence had been committed in British India. I.L.R. 52 Cal. 319, dissented from.

In any event when the person arrested is charged under the Travancore Penal Code of offences corresponding to sections 148, 149, 324 and 436, read with section 109 of the Indian Penal Code, it being a cognisable case, the accused could have been arrested by the police without a warrant if such offence had been committed in British India. Such a person, can therefore be arrested in British India without a warrant.

A. Ramachandran for *Messrs. Row and Reddy* for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S.

Yahya Ali, J. Narasimha Ayyar *v.* Rangathayammal.
18th November, 1946. Cr. R. C. No. 855 of 1946.
(Cr. R. P. No. 822 of 1946).

Criminal Procedure Code (*V of* 1898), *section* 488 (4)—*Scope—Husband and wife—Separate living by mutual consent—Wife withdrawing consent—Right to maintenance.*

Sub-section (4) of section 488 of the Criminal Procedure Code provides that a wife will not be entitled to maintenance if the parties have been living separately by mutual consent. Mutual consent involves the consent of both parties and if the wife decides to put a stop to separate living sub-section (4) ceases to operate. Then the wife gets her right to claim maintenance.

D. Ramaswami Aiyangar and *S. Kuppuswami* for Petitioner.

O. K. Ramalingam for Respondent.

K.S.

Happell and Shahab-ud-din, JJ. Thiagarajan Chettiar, *In re.*
19th November, 1946. Cr. M. P. Nos. 1569, etc. of 1946.

Government of India Act (1935)—*Offences committed before 30th September,* 1946 *in contravention of rules and Ordinances made under Defence of India Act—Prosecutions for—If can be commenced or continued after that date—Ordinance XII of* 1946—*Validity and effect.*

Where offences are committed before the expiration of the six months period after the end of the emergency the accused persons can be prosecuted after the expiration of the period and proceedings instituted against them for such offences before the expiry of the period can be lawfully prosecuted to a conclusion. Ordinance XII of 1946, is *intra vires* and enables the proceedings for offences to be continued.

Certificate under section 205 of the Government of India Act granted.

Sir Alladi Krishnaswami Aiyar, (for *K. Subramanian* and *Alladi Kuppuswami*), *V. V. Srinivasa Ayyangar, J. R. Gundappa Rao, T. R. Srinivasan* and *R. Desikan* for Petitioners.

The Advocate-General (*K. Rajah Aiyar*) and the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J.
30th October, 1946.

Satyanarayana *v.* Sriramulu.
A. A. O. Nos. 622 and 623 of 1945.

Provincial Insolvency Act (*V of* 1920), *section* 42 (1) (a)—*Assets not of a value equal to eight annas in the rupee of the unsecured liabilities of the debtor—If an absolute bar against discharge.*

An application for discharge cannot be dismissed merely on the ground that the assets were not of a value equal to eight annas in the rupee and that section 42 of the Provincial Insolvency Act imposed an absolute bar against discharge. There is no such absolute bar as section 42 (1) (*a*) contains the qualifying clause "unless he satisfies the Court that the fact that the assets are not of a value equal to eight annas in the rupee on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible."

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

Respondents not represented.

K.S.

Wadsworth, O.C.J. and *Govindarajachari, J.*
1st November, 1946.

Bojanna *v.* Kristappa.
L. P. A. No. 27 of 1946.

Civil Procedure Code (*V of* 1908), *section* 151 *and Order* 21, *rule* 90—*Execution sale —If can be set aside on the ground of fraud under inherent powers of Court when no application within limitation has been made under Order* 21, *rule* 90 *for that purpose.*

A Court has no power under section 151 of the Code of Civil Procedure to cancel a sale in execution on the ground of fraud in the valuation of the land, which fraud had not been the subject of an application under Order 21, rule 90 of the Code filed within time. 44 M.L.J. 680 : I.L.R. 46 Mad. 583, doubted.

The Court could not presume the existence of an inherent power to do that for which a statutory provision has been made and the Court has no general discretion to relieve a suitor from the operations of the provisions of the Limitation Act.

K. Subba Rao and *C. Kondiah* for Appellant.

P. Chandra Reddi for Respondent.

K.S.

Rajamannar, J.
6th November, 1946.

Bheema Bhatta *v.* Narayana Bhatta.
S. A. No. 173 of 1946.

Transfer of Property Act (*IV of* 1882), *section* 111 (g)—*Forfeiture of agricultural lease by breach of covenant against alienation—Notice before institution of suit—Necessity —Settlement conferring vested interest on daughter subject to life interest on settlor—If alienation.*

Although the provisions of section 111 (*g*) of the Transfer of Property Act would not apply to agricultural leases, it is necessary as a rule of justice, equity and good conscience for the landlord to show his intention to determine the tenancy by an overt act when there has been a forfeiture by breach of covenant against alienation by the tenant. A suit for ejectment filed by the landlord without giving notice of determination of the tenancy is not maintainable.

I.L.R. 36 Mad. 161 and I.L.R. 38 Mad. 445, referred to.

A.I.R. 1933 Mad. 943, I.L.R. 42 Mad. 589 and (1946) 2 M.L.J. 229, relied on.

A settlement by the lessee which after reserving the interest in himself and his wife settles the property on his daughter amounts to breach of covenant against alienation as the daughter is given a vested interest which is transferable and heritable. (Leave granted).

K. Y. Adiga and *K. P. Adiga* for Appellant.

K. Srinivasa Rao for Respondent.

K.S.

N R C

Chandrasekhara Aiyar, J. Murugesa Mudaliar *v.* Varadayya Naidu.
14th November, 1946. S. A. No. 1066 of 1945.

Registration Act (*XVI of* 1908), *section* 77—*Suit under—Scope—Probabilities and surrounding circumstances—If can be taken into account in arriving at the truth about the execution of a challenged will or sale deed.*

There is no warrant for holding that the probabilities and surrounding circumstances should not be taken into account in arriving at the truth about the execution of a challenged will or sale deed in a suit under section 77 of the Registration Act. While it is true that direct evidence relating to the execution must receive primary importance and value, the point whether the evidence is to be believed or not will naturally depend on various other facts and circumstances bearing on the issue of execution. I.L.R. 22 Cal. 519, considered.

B. Jagannadha Das and *C. V. Dikshitulu* for Appellant.

K. S. Desikan and *L. C. Sundaravaradachari* for Respondent.

K.S.

Yahya Ali, J. Subramanya Ayyar, *In re.*
18th November, 1946. Cr. R. C. No. 1039 of 1946.
(Cr. R. P. No. 994 of 1946).

Indian Penal Code (*XLV of* 1860), *section* 216-A—*Gist of offence of screening persons who had committed dacoity—Acquittal of persons charged with main offence of dacoity—Persons who had screened them—If can be proceeded against for offence under section* 216-A, *Indian Penal Code.*

When a person charged with the substantive offence of dacoity or robbery has been acquitted of that offence, another person who is said to have intended to screen him from legal punishment in respect of that offence cannot be held guilty of harbouring the alleged offender under section 216-A of the Penal Code.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. Ponnuswami Nadar, *In re.*
28th November, 1946. Cr. R. C. No. 958 of 1946.
(Case Refd. No. 31 of 1946).

Criminal Procedure Code (*V of* 1898), *section* 106—*Order under for security to keep the peace and be of good behaviour—If proper on conviction of a person under section* 3 (12) *of the Town Nuisance Act for drunken and disorderly behaviour.*

Where an accused has been found guilty under section 3 (12) of the Town Nuisance Act for drunken and disorderly behaviour and sentenced to a fine of Rs. 10 and in default 2 days rigorous imprisonment, it is a proper case in which section 106, Criminal Procedure Code should be invoked directing the accused to execute a bond with sureties to keep the peace and be of good behaviour for a period of six months.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

Rajamannar, J. Maideemera Labbai *v.* Habibunnissa.
6th November, 1946. S. A. No. 922 of 1945.

Mahomedan Law—Gift—Delivery of possession—Evidence—Deed reciting delivery of possession—Inference as to delivery of possession.

No doubt, the mere registered deed evidencing a gift will not be evidence as such of the transfer of possession but if the deed by its terms showed that possession was intended to be transferred and that the donee had been put in possession, then effect should be given to this intention as constituting delivery of possession in law unless there is evidence to the contrary. (Case-law discussed.)

N. Rajagopala Aiyangar for Appellant.

K. S. Desikan for Respondent.

K.S.

Horwill, J. Punnayappa Nadar & Co. *v.* Sivarama Aiyar & Co.
8th November, 1946. S. A. No. 1156 of 1945.

Contract—Contract with German firm through Indian agent—Outbreak of war—Effect—Indian agent paying the price and taking delivery of goods from custodian of enemy property——If can be compelled to sell the goods in fulfilment of the contract—Defence of India Rules, rule 98—Effect of permitting the agent to receive the goods from custodian of enemy property—If revives the contract.

The appellants entered into a contract with a German firm of which the defendant was the Indian agent. After the war broke out the goods ordered became interned at Padan in the Dutch East Indies and after sometime were re-shipped and brought to India. The defendant eventually obtained possession of these goods from the custodian of enemy property upon payment of their value. The appellant claimed that the defendant was bound to sell the goods to him in fulfilment of the contract.

Held, on the outbreak of the war all contracts with the enemy came to an end and the defendant was not bound to deliver the goods. The proviso to rule 98 of the Defence of India Rules merely made it lawful for the defendant to receive the goods from the custodian of enemy property. But it did not revive the contract that had come to an end because of the declaration of war.

V. C. Gopalaratnam and *L. V. Krishnaswami Aiyar* for Appellant.

K. S. Sankdra Aiyar and *V. Sundaresan* for Respondent.

K.S.

Govindarajachari, J. Chinna Soorayya *v.* Subramanyam.
8th November, 1946. S. A. Nos. 1130, etc., of 1945.

Hindu Law—Widow—Alienation—Necessity—Evidence—Onus—Presumptions—Limits—Absence of challenge by reversioners—Presumption from.

If there is evidence to show that alienations by a widow were not for necessity, no presumption could be drawn to contradict it. If there is evidence that the alienations were for necessity but there are gaps in that evidence, presumptions are permissible to fill in the details which have disappeared by time. But where by lapse of time no evidence of any kind is available or can be expected, a presumption can be drawn that the alienation which stood unchallenged by persons who in the usual course should have challenged it, was supported by necessity. (Authorities discussed.)

(Leave granted.)

D. Narasaraju and *G. Chandrasekhara Sastri* for Appellant.

P. Somasundaram, V. Parthasarathi and *V. Vyyanna* for Respondent.

K.S.

Chandrasekhara Aiyar, J. Kuppanna Goundan *v.* Kathayammal.
12th November, 1946. S. A. No. 2073 of 1945.

Transfer of Property Act (IV of 1882), *section* 39*—Scope and applicability—Hindu wife—If entitled to charge on income of husband's immoveable property—Husband's debts—Precedence—Alienation for such debts—If can be challenged by wife claiming maintenance.*

Section 39 of the Transfer of Property Act speaks only of a person who has got a right to receive maintenance from the profits of immoveable property. The wife is not such a person ; her right is to receive maintenance from the husband and not from the profits of immoveable property belonging to him, so long as no charge has been created in her favour.

Under the Hindu Law the debts of the husband take precedence over the wife's right to maintenance and if an alienation is made by the husband for satisfaction of such debts the wife cannot challenge the transaction.

A. Srirangachari for Appellants.

K. S. Desikan for Respondent.

K.S.

Chandrasekhara Aiyar, J. Thetharappa Mudaliar *v.* Meenakshisundara Mudaliar.
21st November, 1946. C. R. P. No. 1301 of 1945.

Lease by all the co-sharers—Obstruction to lessees by one of the co-sharers—Remedy of other co-sharers.

If a co-sharer offers obstruction to lessees, in whose favour a proper and valid lease has been granted, and prevents the lessees from cultivating, it is as if the other co-sharers have been excluded or ousted from possession of their shares for the time being and they are entitled to compensation for such exclusion. It cannot be said that in such a case the remedy of any of the other co-sharers is only to file a suit for partition or to seek to recover the proceeds from the lessees, leaving the lessees to recover the loss from the obstructing co-sharers.

R. Gopalaswami Aiyangar for Petitioner.

R. Desikan for Respondent.

K.S.

Yahya Ali, J. Narayanaswami Mudaly, *In re.*
28th November, 1946. Cr. R. C. No. 725 of 1946.
(Cr. R. P. No. 694 of 1946).

Defence of India Rules, rule 81 (4) *and Kerosene Control Order* (1942), *clause* 12—*Person conducting a solitary transaction of sale of one tin of kerosene—If "dealer" or "retailer" "carrying on business"—Absence of registration as such dealer—If contravention of Kerosene Control Order.*

Clause 12 of the Kerosene Control Order, 1942, prescribes that no person shall carry on business as a retail dealer unless he has been registered as such under the Kerosene Control Order by the Collector having jurisdiction over the place where the retail dealer carries on business. But a person who conducted a solitary transaction of sale of one tin of kerosene is not a retailer nor does it constitute the transaction a "business" to amount to his "carrying on business as retail dealer" within the meaning of clause 12. Carrying on business always connotes conducting of more transactions than one by way of trade or commerce and the concept of dealer also has in it implicit the notion that he carries on transactions of purchase, sale or distribution as a business and both these expressions exclude the idea of a solitary transaction of purchase or sale constituting either a business or constituting the person making the sale a retail dealer.

A. Nagarajan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. Subbayya Goundan, *In re.*
28th November, 1946. Cr. R. C. No. 726 of 1946.
(Cr. R. P. No. 695 of 1946).

Defence of India Rules, rule 130—*Scope—Facts constituting offence of contravention of rules set out—Mention of rule contravened—If essential to confer jurisdiction on Court.*

All that rule 130 of the Defence of India Rules provides is that no Court or Tribunal shall take cognizance of any alleged contravention of the rules or any order made thereunder except on a report made in writing of the facts constituting such transaction made by a public servant. Where such a report mentions all the requisite facts the Court has jurisdiction to take cognizance. The proper rule that should be applied is a matter for the Court to decide upon the evidence. The fact that the charge sheet filed by the police mentioned only rule 75 (A) (1) of the Defence of India Rules while the charge framed by the Court proceeded on the basis of rule 75 (A) (2) does not invalidate the proceedings for failure to deliver paddy that had been requisitioned and acquired by the authorities.

A. Narayana Pai for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth and Govindarajachari, JJ. Krishnaswami Iyer *v.* Official Liquidator, Podanur Bank, Ltd.
14th November, 1946. A. A. O. No. 197 of 1946, etc.

Companies Act (VII of 1913), *section* 237—*Order sanctioning prosecution of* "*any director, manager or other officer*" *for* "*any offence*"—*Sustainability.*

An order sanctioning the prosecution of "any director, manager, or other officer" of a company for "any offence" cannot be sustained. Section 237 of the Indian Companies Act certainly contemplates a finding that a specified individual is to be prosecuted for a specified offence and does not enable the Court to issue an order in blank for the prosecution of unnamed individuals for unnamed offences.

G. R. Jagadisa Aiyar for Appellants.

M. S. Krishnamoorthy Sastri for Respondents.

K.S.

Yahya Ali, J. *Mahomed Rahimulah and Kurshid, *In re.*
15th November, 1946. Crl. R. C. No. 595 of 1946.
(Case Referred No. 25 of 1946).

Criminal Procedure Code (V of 1898), *sections* 488, 489 *and* 490—*Order for maintenance against a Mahomedan husband—Divorce of wife—Effect on order for maintenance.*

When a valid and irrevocable divorce has been given by a Mahomedan husband to his wife in conformity with the Mahomedan Law and he has also paid the *iddat* maintenance he is not bound to continue to pay maintenance awarded to his wife under section 488, Criminal Procedure Code. In such circumstances the Magistrate is not only bound to refuse to enforce the order under section 490, Criminal Procedure Code, but is also empowered under section 489 to alter the amount payable under it to nothing, that is to say by a combined effect of both the provisions he is competent to set aside the order awarding maintenance.

Case-law discussed.

A. Kirmani for 1st Respondent.

B. Pocker (Amicus Curiae) for 2nd Respondent.

K.S.

Rajamannar, J. Kandaswami Pillai *v.* Rama Iyer.
15th November, 1946. S. A. No. 677 of 1946.

Transfer of Property Act (IV of 1882), *sections* 76 (h) *and* 77—*Mortgagee in possession—Duty to account for income.*

The mortgagor is under the law, and notwithstanding that there may not be any specific agreement to that effect entitled to an account from the mortgagee as to the receipts from the mortgaged property which from time to time came into the hands of the mortgagee unless there is a contract between the parties which takes the case out of section 76 (*h*) of the Transfer of Property Act and brings it within section 77.

I.L.R. 54 All. 205 and A.I.R. 1929 Pat. 571, relied on.

The fact that the mortgage deed is silent as to the disposal of the surplus over the interest fixed in the deed does not necessarily mean that the surplus, if any, has to be taken by the mortgagees. The surplus would in law and equity be money belonging to the mortgagor and the mortgagee would not be entitled to take it for interest unless there is specific provision to that effect. In the absence of any specific provision either way as to the disposal of the surplus income the absolute liability of the mortgagee to account remains.

[Leave granted.]

S. V. Venkatasubramania Aiyar for Appellant.

N. R. Sesha Aiyar for Respondent.

K.S.

Wadsworth, J. Krishnamacharyulu *v.* Subba Rao.
15th November, 1946. C. R. P. No. 1455 of 1945.

Madras Agriculturists' Relief Act (IV of 1938)—*Remand of suit for fresh disposal after holding that Act (IV of* 1938) *does not validly affect promissory notes—Subsequent coming into effect of validating Ordinance No. XI of* 1945—*If affects finality of decision implicit in the order of remand.*

Where in a Civil Revision Petition it was held that the Madras Act IV of 1938 does not validly affect promissory notes and the suit was remanded for fresh disposal and subsequently the validating Ordinance XI of 1945 was passed,

Held, the provisions of the validating ordinance are retrospective. Notwithstanding the decision implicit in the order of remand, the debtor can get the advantage of the provisions of the validating ordinance subsequently promulgated. The debtor is therefore entitled to relief on the footing that Madras Act IV of 1938 applied to debts under promissory notes.

D. Narasaraju for Petitioner.

N. Bapi Raju for Respondent.

K.S.

Horwill and Kuppuswami Ayyar, JJ. Venkatareddy *v.* Raghavayya.
21st November, 1946. A. A. O. No. 29 of 1945.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 2 *and Order* 23, *rule* 3—*Payment otherwise than into Court under a preliminary mortgage decree—If can be recognised by the Court and satisfaction entered.*

It cannot be said that the only payment that can be recognised by a Court under a preliminary mortgage decree is a payment into Court in accordance with the directions of the decree. The final decree proceedings are in continuation of the suit and when payment is made under the preliminary decree otherwise than into Court the suit is pending and the payment made in satisfaction of the claim would be one under Order 23, rule 3 of the Code of Civil Procedure.

(1945) 2 M.L.J. 367 : L.R. 72 I.A. 277 : I.L.R. 20 Luck. 461 (P.C.), relied on.

A.I.R. 1930 Mad. 105 ; A.I.R. 1931 Mad. 592 and 69 M.L.J. 765 : I.L.R. 59 Mad. 188, not followed as overruled by I.L.R. 20 Luck. 461 (P.C.).

K. Krishnamoorthi for Appellant.

A. Bhujanga Rao, M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Wadsworth, J. Dharmiah *v.* Yanadhi Reddi.
26th November, 1946. A. A. A. O. No. 96 of 1945.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 19 *and* 12—*Decree not containing any provision for payment of subsequent interest—Scaling down—6¼ per cent. interest on scaled down amount from 1st October,* 1937, *under section* 12 *of the Act—If can be ordered.*

Where a decree for a debt contained no provision for payment of subsequent interest, and that decree debt is scaled down under section 19 of Madras Act IV of 1938, there is no warrant under section 12 for adding a liability for interest to the scaled down amount from 1st October, 1937.

[Leave refused.]

K. Umamaheswaram for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Wadsworth and Govindarajachari JJ. Ayisha Bibi *v.* Muhammad Sadakathulla Maracair.

28th November, 1946. C. R. P. Nos. 336 of 1946, etc.

Madras Civil Courts Act (*III of* 1873), *sections* 12 *and* 13—*Suit valued lower than it ought to be and heard and decided by District Munsiff—Forum of appeal—High Court or Subordinate Judge's Court.*

Regarding sections 12 and 13 of the Madras Civil Courts Act together, when a suit is entertained by the District Munsiff's Court on the basis of its own valuation, that valuation will determine the forum of the appeal and nothing in section 13 of that Act will justify the entertainment of an appeal by the High Court from the decision of the District Munsiff's Court, even though on a correct valuation the suit should have been tried by the Court of the Subordinate Judge and the appeal should have been laid to the High Court.

I.L.R. 46 Mad. 631 and I.L.R. 40 Mad. 11, relied on.

I.L.R. 16 Mad. 326 and I.L.R. 39 Mad. 447 and (1942) 2 M.L.J. 587, dissented from.

20 M.L.J. 726 and 58 L.W. 282, referred to.

The valuation of the suit in the plaint determines the forum of appeal unless and until the plaint has been amended.

T. E. Ramabhadrachariar and *M. S. Krishnaswami Aiyangar* for Appellant.

K. Srinivasan for Respondent.

K.S.

Horwill, J. Venkatareddi *v.* Venkataratnam.

29th November, 1946. C. M. P. No. 5218 of 1946.

Civil Procedure Code (*V of* 1908), *section* 151—*Inherent powers—Scope—Final order passed upon a considered request for permission to withdraw—If can be reopened on a petition under section* 151 *of the Civil Procedure Code.*

A final order passed upon a considered request for permission to withdraw a civil revision petition should not be reopened on a petition under section 151 of the Code of Civil Procedure.

C. Rama Rao for Petitioners.

P. Somasundaram and *K. Mangachari* for Respondents.

K.S.

Yahya Ali, J. Muniswami and another, *In re.*

29th November, 1946. Cr. R. C. No. 960 of 1946.
(Case Referred No. 33 of 1946).

Criminal Procedure Code (*V of* 1898), *sections* 562 *and* 380—*Trial Sub-Magistrate considering that one of the convicted persons should be dealt with under section* 562 *of the Code—If prohibited from sending the whole case and all the accused to Sub-Divisional Magistrate.*

There is nothing in the language of sections 562 and 380 of the Code of Criminal Procedure which prohibits a Magistrate of the second or third class sending up all the accused, the whole case and the entire proceedings to the Sub-Divisional Magistrate in a case where he suggests that action should be taken under section 562 of the Code against only one or few of the accused persons. Sections 562 and 380 practically constitute in themselves a complete and self-sufficient machinery to meet such cases and it is hardly necessary to invoke the aid of section 349 of the Criminal Procedure Code to determine whether in such cases all accused should be sent up or only the person against whom action under section 562, Criminal Procedure Code, is contemplated. (Case-law discussed.)

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. Pappammal, *In re.*
3rd December, 1946. Cr. R. C. No. 718 of 1946.
(Cr. R. P. No. 689 of 1946).

Defence of India Rules (1939), *rule* 81 (4)—X *accused of selling paddy to* Y *and* Z *who were also accused—Statements by* Y *and* Z *that they purchased paddy from* X—*If admissible as substantive evidence against* X.

Where *X* was accused of selling paddy to *Y* and *Z* who were accused of buying the paddy and *Y* and *Z* made statements that they purchased the paddy from *X*, such statements being in the nature of confessions of co-accused cannot form a substantial basis for conviction of *X* unless they are supported by independent evidence.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Yahya Ali, J. Gopalan *v.* Krishnan.
11th December, 1946. C. M. P. No. 4281 of 1946.

Madras Tenants and Ryots Protection Act (*XVII of* 1946), *section* 4, *clauses* (1) *and* (9)—*Applicability—Person in Malabar taking lease of land for a period of six months for the purpose of storing timber—Decree for eviction for holding over—Execution—Lessee—If "tenant" entitled to benefit of Madras Act XVII of* 1946 *and to obtain stay of execution of the decree for eviction.*

Where a person in Malabar taking a lease of land for a period of six months for the purpose of storing timber was sought to be evicted when he held over contrary to the terms of the lease and a decree was passed against him, and pending execution proceedings the Madras Tenants and Ryots Protection Act, 1946, came into force on 4th October, 1946,

Held, the lessee is a "tenant" in the District of Malabar within the definition of that word occurring in the Malabar Tenancy Act and consequently Act XVII of 1946 applies to the case and execution of the decree for eviction in respect of the suit property must be stayed under clauses (1) and (9) of section 4 of the Madras Act XVII of 1946.

K. Kuttikrishna Menon and *G. Gopinath* for Petitioner.

T. R. Venkatarama Sastri and *T. B. Balagopal* for Respondent.

K.S.

[END OF VOLUME, 1946—II.]